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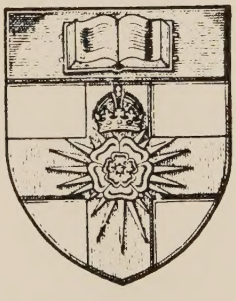

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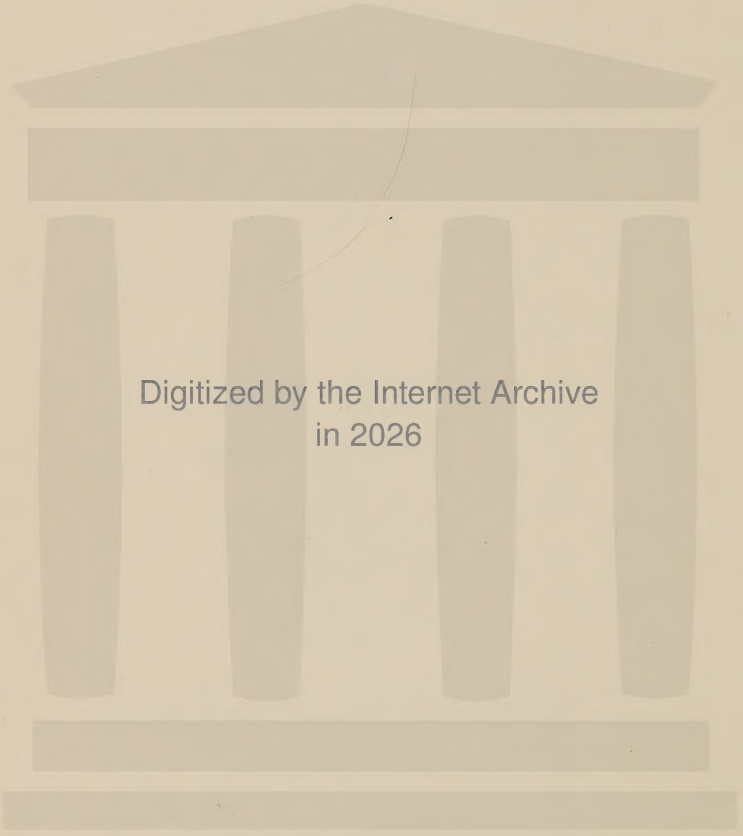
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1928.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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House of Lords . . . . H. B. HEMMING, *Barrister-at-Law.*

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1928.

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MEMORANDA.

1927.

Dec. 17. The Right Hon. Sir John Eldon Bankes, *lately a Lord Justice of Appeal, was appointed to be a G.C.B.*

1928.

Feb. 11. The Right Hon. Sir James Richard Atkin, *Knight, one of the Lords Justices of Appeal, was appointed to be a Lord of Appeal in Ordinary in the room of the Right Hon. Lord Atkinson, resigned. The dignity of a Baron for life was conferred upon* Sir James Atkin *by the name, style and title of Baron Atkin of Aberdovey in the County of Merioneth.*

Feb. 11. Sir John Sankey, G.B.E., *one of the Justices of His Majesty's High Court of Justice, King's Bench Division, was appointed to be one of the Lords Justices of Appeal in the place of Right Hon. Sir James Richard Atkin.*

Feb. 11. John Anthony Hawke, Esq., K.C., M.P., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, in the place of Sir John Sankey, and was afterwards knighted.*

Feb. 15. The Right Hon. the Earl of Oxford and Asquith, K.G., *a member of the Judicial Committee of the Privy Council, died this day at The Wharf, Sutton Courtney, Berkshire, aged* 75.

Feb. 18. Sir Travers Humphreys, Knight, *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division.*

Feb. 18. Ernest Bruce Charles, Esq., C.B.E., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, King's Bench Division, and was afterwards knighted.*

The Hon. Mr. Justice Salter *was nominated to be ex-officio Commissioner for England under the Railway and Canal Traffic Act,* 1888.

Mar. 6. The Right Hon. Lord Sinha of Raipur, K.C.S.I., K.C., *a Member of the Judicial Committee of the Privy Council, died suddenly this day at Berhampore, India, aged* 64.

Mar. 22. *This day* Sir John Sankey, G.B.E., *Lord Justice of Appeal, was, by His Majesty's Command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Mar. 29. The Right Hon. Viscount Cave, G.C.M.G., *having resigned the office, the Great Seal was this day delivered to the* Right Hon. Sir Douglas McGarel Hogg, K.C., *whereupon the oath of office as Lord High Chancellor of Great Britain was, by His Majesty's command, administered to him, and he took his place at the Board accordingly.*

Mar. 29. The Right Hon. Viscount Cave *died this day at his country house, St. Ann's, Burnham, Somerset, aged* 72.

Mar. 29. Sir Thomas Walker Hobart Inskip, C.B.E., K.C., M.P., *Solicitor-General, was appointed to be His Majesty's Attorney-General in the place of the Right Hon. Sir Douglas McGarel Hogg, K.C.*

Mar. 29. Frank Boyd Merriman, Esq., O.B.E., K.C., M.P., *was appointed to be His Majesty's Solicitor-General in the place of Sir Thomas Walker Hobart Inskip, C.B.E., K.C., M.P., and was afterwards knighted.*

Apr. 7. *The dignity of a Baron of the United Kingdom was conferred on the* Right Hon. Sir Douglas McGarel Hogg, *Lord High Chancellor of Great Britain, by the name, style and title of Baron Hailsham of Hailsham in the County of Sussex.*

Apr. 17. The Hon. Frank Russell, *one of the Justices of His Majesty's High Court of Justice, Chancery Division, was appointed to be one of the Lords Justices of Appeal in the place of the Right Hon. Sir Charles Henry Sargant, resigned.*

Apr. 17. Frederick Herbert Maugham, Esq., K.C., *was appointed to be one of the Justices of His Majesty's High Court of Justice, Chancery Division, in the place of the Hon. Frank Russell, and was afterwards knighted.*

May 7. *This day the* Hon. Frank Russell, *Lord Justice of Appeal, was, by His Majesty's command, sworn of His Majesty's Most Honourable Privy Council, and took his place at the Board accordingly.*

Aug. 3. The Right Hon. Syed Ameer Ali, C.I.E., *a member of the Judicial Committee of the Privy Council, died this day at Pollingfold Manor, Rudgwick.*

Aug. 7. The Right Hon. Walter George Frank, Baron Phillimore, *a Lord of Appeal, was appointed to be a G.B.E.*

Aug. 19. The Right Hon. Viscount Haldane of Cloan, K.T., O.M., *twice Lord High Chancellor, died this day at his residence, Cloan, Auchterarder, aged* 72.

Oct. 2. The Right Hon. Sir Lawrence Hugh Jenkins, K.C.I.E., *sometime a member of the Judicial Committee of the Privy Council, died this day, aged* 69.

Oct. 14. The Right Hon. Sir Edward Ridley, *sometime a Justice of His Majesty's High Court of Justice, King's Bench Division, died this day at* 48 *Lennox Gardens, London, aged* 85.

ERRATA.

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76	footnote (1)	L. R. 3 H. L. 263	L. R. 3 H. L. 330
376	10	denominational	undenominational
404		*Harold Willis* appeared with *Sir Reginald Mitchell Banks K.C.* and *Croom-Johnson K.C.* for the landlords.	

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

J. C. HOUGHTON AND COMPANY . . APPELLANTS ; H. L. (E.)*
1927
AND
Nov. 7.
NOTHARD, LOWE AND WILLS, LIMITED . . . . . RESPONDENTS.

Company—Directors and Officers—Agreement by Director confirmed by Secretary—Ostensible Authority—Estoppel.

Two rival companies, the N. Company and the W. Company, formed the respondent company to take over certain branches of their business of fruit importers, the shares of the new company being equally divided between the two old companies, and the board consisting of two directors of the N. Company—namely, M. and G. Lowe—and two directors of the W. Company. By a brokerage agreement embodied in a letter dated in July, 1924, between M. Lowe and the appellants, a firm of fruit brokers, it was arranged that the appellants should make certain advances to the N. company and should receive all fruit consigned either to the N. Company or to the respondent company and keep back 70 per cent.

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* *Present:* VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD CARSON.

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of the net proceeds in reduction of the advances, and it was stipulated that the respondent company should subscribe to this arrangement. The appellants also obtained a guarantee of the loan from the two Lowes and a third director of the N. Company, who was also the secretary of the respondent company. This arrangement was not ratified by any agreement under the seal of the respondent company, but the secretary wrote to the appellants purporting to confirm the arrangement on behalf of his company. The directors of the respondent company, other than the two Lowes, first became aware of the arrangement after it had been in operation for some months, and it was then put an end to. The appellants had obtained fruit consigned to the respondent company on board several ships without production of the bills of lading, on giving an indemnity to the ships, and they sued the respondent company for delivery of the bills of lading. The respondents counterclaimed for the proceeds of fruit belonging to them and not accounted for :—

Held (by Viscount Dunedin, Viscount Sumner, Lord Atkinson and Lord Carson; Lord Shaw of Dunfermline dissenting), (1.) that the arrangement contained in the agreement of July was not authorized by the respondent company; and (2.) that the respondent company were not estopped from denying the existence of the arrangement by the knowledge of the Lowes, inasmuch as they were parties to the wrong done to the company, or by the omission of the other directors to inspect the accounts of the company, which would have disclosed the arrangement.

In re Hampshire Land Co. [1896] 2 Ch. 743 applied.

Decision of the Court of Appeal [1927] 1 K. B. 246 affirmed.

APPEAL from an order of the Court of Appeal reversing a judgment of Wright J.

The appellants were fruit brokers of Liverpool.

The respondent company was incorporated in July, 1920, for the purpose of importing and selling fruit in the United Kingdom. It was formed by agreement between two companies, Nothard & Lowe Fruit and Preserving Company, Ld., and Wills & Sons, Ld., who before its formation were engaged in a similar business in competition with one another.

The action was brought by the appellants against the respondent company for delivery of certain bills of lading in respect of fruit consigned to the respondent company at Liverpool on board several ships which arrived in November, 1924.

The respondent company counterclaimed for the total sum retained by the appellants out of the proceeds of the respondent company's fruit.

The questions for determination were: (1.) whether the brokerage agreement referred to in the headnote and made with the appellants in July, 1924, by one Maurice Lowe, who was a director of the Nothard & Lowe, &c., Company, and also of the respondent company, was made by him on behalf of the respondent company, and (2.), if so, whether he had any authority so to act.

Wright J. held that Maurice Lowe purported to act on behalf of the respondent company, and that he had ostensible, though no actual, authority so to act, and he gave judgment for the appellants upon the claim and counterclaim. The Court of Appeal (Bankes, Atkin and Sargant L.JJ.) reversed the decision of the learned judge and ordered judgment to be entered for the respondents on the claim and counterclaim.

The facts are fully stated in the report of the case before the Court of Appeal and in the opinion of Viscount Dunedin.

The arguments used in the House of Lords were substantially the same as those in the Court of Appeal and need not be repeated.

1927. July 5, 7. *Sir John Simon K.C.* and *A. T. Miller K.C.* (with them *Porter K.C.*) for the appellants.

Upjohn K.C. and *R. Fortune* for the respondents.

The House took time for consideration.

1927. Nov. 7. VISCOUNT DUNEDIN. My Lords, the appellants in this case are fruit brokers and the respondents are a fruit importing company. The action which was raised by the appellants was for delivery of certain bills of lading. This was met by denial of the right to ask for them and by a counterclaim for a sum of money which has eventually been settled at 19,757*l.* 8*s.* 7*d.*, being the proceeds of fruit belonging to the respondents and sold by the appellants, for which they had not accounted. The learned trial judge gave judgment in favour of the appellants on both points, the Court of Appeal reversed on both points, hence this appeal.

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To make the case intelligible, it is necessary to detail the history of the parties. As regards the appellants little need be said; they are an ordinary firm of well established fruit brokers. The business of a fruit broker is to sell fruit for the importer to the various retail dealers in the United Kingdom. The fruit is bought abroad by the importer and consigned to him, bills of lading being made out in his name as consignee. In many cases the fruit actually arrives before the bills of lading, and as fruit is a perishable commodity it is common practice for the broker, who has been advised of the consignment expected on a certain ship, to go to the ship and get immediate delivery, giving an obligation to the ship to present the bills of lading when received and giving an indemnity against any possible claim if the bills of lading are not forthcoming. It is also a common practice for an agreement to be come to between the broker and the importer by which the broker finances the importer by making advances and recoups himself by being allowed to retain the proceeds of the fruit when sold.

The position of the respondents needs more minute explanation and history. There was a firm of fruit importers known as George Wills & Co., which had been formed into a company called Wills & Co., Ld. There was another firm of fruit importers called Nothard & Lowe, which had been formed into a company called Nothard & Lowe Fruit Preserving Company, Ld. Although this was the proper title of the company, the company was generally known and spoken of as Nothard & Lowe. The two companies, finding that they were apt to be in competition, agreed to eliminate this competition in certain branches of the fruit trade. To effect this object they formed another company called Nothard, Lowe & Wills, Ld., who are the respondents in this case. This company had within its memorandum very wide powers, but practically it was to be a fruit importing company. The shares were practically all held in substantially equal

proportions by the two companies which had arranged for its formation. Two of the directors—namely, Messrs. Walker and Braund—were taken from the George Wills Company, they being directors of it, and the other two directors were taken from the Preserving Company, being directors of it.

Contemporaneously with the formation of the company, a tripartite agreement was entered into between the two old companies and the new. By this agreement the nomination of the directors as aforesaid and the equal contribution to the capital was provided for. Fresh fruit was defined as all fruit except tomatoes, in all parts of the world except Italy, Spain, Portugal, Nova Scotia, the Canary Islands and France. Then each of the two older companies undertook to leave the trade in fruit, as defined, exclusively to the new company, they being free to continue their own trade in all other classes of fruit.

For the purposes of this case it may therefore be stated that American apples were the province of the new company, Nova Scotian apples the province of the other companies, and, in particular, of the preserving company, which I shall hereafter designate by its trade sobriquet of Nothard & Lowe. It was also provided that the new company should have the benefit of Nothard & Lowe's premises and the use of its personnel. A certain payment was to be made in return for these services. The date of the registration of the new company was April, 1920.

The new company started business. By arrangement Maurice Lowe was the director to whom was entrusted the arrangements as to brokerage. In this matter George Lowe was associated with him. Walker looked after the shipping arrangements and the buying of fruit for importation. For some time brokers other than the appellants were employed, but in May, 1924, Maurice Lowe approached Mr. Dart, who represented the appellants, with a view to making a brokerage arrangement as to apples. The apples he wished dealt with

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were American apples, the property of the respondents, and Nova Scotian apples, the property of Nothard & Lowe. As Nothard & Lowe were throughout acting for the respondent company, Maurice Lowe was in the habit of dealing with the two sets of apples together. Now at this time the Nothard & Lowe Company was hard pressed for money. This was, of course, known to the two Lowes, but was not known to the other two directors, Walker and Braund. Maurice Lowe and Dart had several meetings, which were spoken to by Dart before the trial judge. Maurice Lowe was not examined. It is, however, unnecessary to consider the exact terms of Dart's evidence, because undoubtedly the result of all the preliminary arrangements was reduced to writing in a letter which passed between the two contracting parties. The final position was expressed in a letter of July 16, 1924, written by Dart to Maurice Lowe. It is in the following terms :—

"Dear Mr. Lowe,

I think it well to confirm the conversation we had on Monday in writing, to see if we understand each other correctly. I wish to commence by thanking you for the offer of the business and feel that if we once start working together we shall neither of us have anything to regret.

I understand that you wish my firm to advance to Messrs. Nothard & Lowe 10,000*l.* now, and another 5000*l.* on 25th August and a final 5000*l.* some time in September making a total of 20,000*l.* and that you would give us the deeds of your packing houses as security, which are worth some 13,000*l.* Presumably these documents you will have recorded at the Register of Deeds in the usual way. You will guarantee a minimum of 50,000 barrels Nova Scotian apples. Besides your Nova Scotian fruit, we would receive free of advance all the goods consigned to Messrs. Nothard, Lowe & Wills at Liverpool, and the total of the two firms would amount

to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the goods belonged to your firm or to Messrs. Nothard, Lowe & Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe, & Wills would have to be subscribed to by them.

As regards your marine insurance policy, presumably you have something better than the ordinary F. P. A. clause, and that you are covered against breakdown of steamer or delay in arriving at its destination.

The interest would be ½ per cent. over bank rate with the minimum of 5 per cent. from the date of advance to the time of making up account sales.

I sincerely hope that you have made rapid progress and are now feeling better.

With my very kindest regards,

Yours very truly,
J. W. DART.

Maurice Lowe, Esq.,
C/o Messrs. Nothard & Lowe,
Cotton's Wharf, Tooley Street,
London, S.E. 1."

Following upon this an agreement was made and executed by Nothard & Lowe, as the Preserving Company, to which agreement Maurice Lowe, George Lowe and a Mr. Prescott, who was also secretary of the respondent company, as individuals were associated as guarantors. The material parts of the agreement were as follows. By clause 1, the plaintiffs were to advance to the Preserving Company, at various dates, sums amounting in all to 20,000*l.*; by clause 2, the Preserving Company were, in security of these advances, to deliver to the plaintiffs the title deeds of certain premises in Nova Scotia belonging to them; by clause 3, the individual guarantors guaranteed the loan to the extent of 10,000*l.*; by clause 4, the Preserving Company appointed the appellants sole brokers for its fruit during the season 1924–25 and

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guaranteed 50,000 barrels of Nova Scotian apples. Then clauses 5 and 6 must be quoted in full:—

"Clause 5: Seventy per cent. of the net proceeds which shall arise from the sale of fruit so consigned to the agents after deducting the usual brokers' commission and sale expenses shall be retained by them and applied in or towards repayment of the said advances and the balance of thirty per cent. of such net proceeds shall be payable by the agents to the company forthwith on the making up of the account of any and every such sale.

Clause 6: For the consideration aforesaid the company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances seventy per cent. of the net proceeds of the sale of goods sold by the agents on behalf of or as agents for Nothard, Lowe & Wills, Limited."

This agreement was executed under the seal of the Preserving Company, and by the signatures of the individual guarantors; a counterpart of the agreement was executed by the appellants. Finally, on the same day, the following letter was despatched and received by the appellants.

"NOTHARD, LOWE & WILLS, LTD.
Cotton's Wharf,
Tooley Street,
London, S.E. 1.

Directors:
M. A. Lowe
F. W. Braund
H. W. Walker
G. N. Lowe.

July 22nd, 1924.

Messrs. J. C. Houghton & Co.,
1, Temple Court,
Liverpool.

Dear Sirs,

We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on

our behalf are to be placed by you in reduction of advances made to Messrs. Nothard & Lowe in the same proportions and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard & Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to.

Yours faithfully,

For NOTHARD, LOWE & WILLS, LTD.

A. V. PRESCOTT,

Secretary."

The initial advance of 10,000*l.* was made, and shipment then began both of American and Nova Scotian apples. The whole were treated by Maurice Lowe as in one account. The appellants first retained 70 per cent. of all the sales which were effected; eventually further advances were made, and by agreement with Maurice Lowe the appellants retained the whole proceeds of the sales of the fruit in respect of which these advances were made. The whole of the advances were applied by Maurice Lowe or George Lowe to meeting the necessities of the Preserving Company and were not put, to any extent, to the credit of the respondent company.

It will have been observed from the whole recital that there was no meeting of directors or minutes of the respondent company sanctioning these arrangements and no agreement under seal of the company agreeing to or ratifying them.

Turning now to the movements of the directors. Walker was absent up till August 9. By that time Maurice Lowe had left the country, and he did not return till October. Braund had been in London in early August and then was away till the third week of September. During the whole time, therefore, there had been no meeting of directors and neither Walker nor Braund had met Maurice Lowe. After Walker got back in August, early in September he had a

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conversation with George Lowe, as he found that the advances from George Wills & Co., his company, to the respondent company, were rather large. George Lowe explained that owing to a strike in Covent Garden there had been great difficulty in recovering accounts, and Walker was satisfied with the explanation. There was no conversation as to the position of the respondent company and the Preserving Company. Maurice Lowe having returned in the middle of October, a few days after this his accountant, whose name was Nash, applied for a further advance from George Wills & Co. to the Preserving Company. Walker refused the request, and it was renewed by Maurice Lowe. Maurice Lowe not being able to give satisfactory explanations why the money was wanted, Walker reported the matter to the Board of George Wills & Co., and they then instructed their own accountant, Curtis, to look into the books of the two companies. This was about October 10. As a result of the investigation, Walker and Braund became aware, for the first time, that the advances by the plaintiffs had been entirely applied to the needs of the Preserving Company and that the Preserving Company was hopelessly insolvent. As a result, a directors' meeting of the respondent company was held on November 7, and on that day the following minute was passed :—

"IT WAS RESOLVED—

No further loans by Nothard, Lowe & Wills, Ltd., to any other company to be made and no proceeds of any of Nothard, Lowe & Wills, Ltd.'s fruit to be diverted from the company's funds and no further payments of any sort to be made to the Nothard & Lowe Fruit and Preserving Co., Ltd., or their subsidiary companies.

Present

Messrs. M. A. Lowe (chairman), F. W. Braund, H. W. Walker, G. N. Lowe and the Secretary."

After this Curtis called Walker's attention to the retention by the plaintiffs of the proceeds of the respondents' apples, and said that he had been given to understand that there was some sort of agreement under which this had been done. Upon that Walker had a meeting with Maurice Lowe, who then produced the agreement of July 22. He did not then make any mention of the letter of the same date. Walker, looking at clause 6 of the agreement, said that it purported to make the company a third party to the agreement without their seal, and that as it stood it was not binding on the company. A few days afterwards the letter of July 22 was produced for the first time. Walker then repudiated the idea of the company being bound; a directors' meeting was held on November 14 and George Lowe was removed from the Board.

At this time there had been a delivery of apples to the plaintiffs of which, as explained above, the bills of lading had not arrived. The plaintiffs applied for the bills of lading and were refused, whereupon, on November 21, the plaintiffs raised the present action. This was met by a counterclaim for the sums due in respect of the company's apples which had been sold by the plaintiffs and of which the proceeds had been retained, either to the extent of 70 per cent. or altogether, as set forth above.

The real question in the case is, therefore, whether the arrangement contained in the agreement of July 22 and the letter of the same date bind the company. Viewed as documents it is clear that neither the one nor the other can have that effect. The company is not a party to the agreement, and the arrangement is of such a character as to be quite beyond the power of a secretary to impose on the company, there having admittedly been no meeting of directors to authorize the dispatch of the letter.

The case of the plaintiffs is rested on quite different grounds, and may be stated thus. It is a well known custom of the

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fruit trade that the importers should make arrangements with brokers for advances, the latter being allowed to retain from the sales the amount of such advances. With the sanction of the whole of the directors of the company, Nothard & Lowe, or the Preserving Company, of which Maurice Lowe was the acting director in such matters, were empowered to make brokerage arrangements for the company. True it is that such an authority to conclude brokerage arrangements would not authorize the impledgment of the company's apples for another person's debt. But then, to the knowledge of the directors, Nothard & Lowe acted not only for the company but also for themselves in the sale of Nova Scotian apples. Accordingly the authorization would include any arrangement which Nothard & Lowe made as to advances to them as managers of the pooled apples of the company and of the preserving company. That was the arrangement made, and that binds the company.

Now various arguments may be directed against this contention, but without stating them it is obvious that the keystone of the arch is the fact, that the advances in respect of which retention is said to be authorized were made to Nothard & Lowe, as managers of the pooled apples. If the advance was not made to them in that capacity, but simply in their capacity of the Preserving Company, the whole argument breaks down.

My Lords, I am of opinion that the Court of Appeal was right in holding that the advances made by the plaintiffs in respect of their agreement with Maurice Lowe were knowingly made to the Preserving Company as the Preserving Company; and they looked to Maurice Lowe to obtain additionally the sanction of the respondent company to allow their apples to be subject to retention for these advances. This is clear from the first. In the letter of July 16 Dart says, in specifying the arrangements: "I should presume the arrangement with respect to Messrs. Nothard, Lowe &

Wills will have to be subscribed by them." Then came the formal agreement to which the Preserving Company were parties and the defendant company were not. The advances are to be made to the party of the first part—i.e., the Preserving Company—and that it is not made to them as managers of a combined stock is made quite clear by clause 6, which treats the binding of the defendant company as a separate arrangement which the Preserving Company is to secure. It is perfectly plain from this that the appellants were still in the same mind that they were in when they wrote the letter of July 16. They knew they were making the advances to the Preserving Company, and that therefore in order to pledge the property of the defendant company for that debt they would need special authorization. They believed that Nothard & Lowe could get them that authorization, and they bound the Preserving Company to get it for them. They, in the sequel, rested content with the letter signed by the secretary. In doing so they took a risk which they must have known—namely, the risk that the letter was unauthorized. They took care to bind the Preserving Company by the seal of the company; they neglected that precaution with the defendant company, and they must suffer for it. Unfortunately not only Maurice Lowe but Prescott was interested in procuring the arrangement, for Prescott was one of the individual guarantors under the agreement. I do not wish to use unnecessarily strong language or to sit in moral judgment on the persons concerned, but all that happened is but another instance of how perilous a thing it is for persons who are in a fiduciary position to entangle themselves with absolutely conflicting interests. The interests of the two Lowes and Prescott were bound up with the Preserving Company, and their duty to the defendant company suffered in consequence.

The plaintiffs, for whom one cannot help feeling sympathy, for they were betrayed by their confidence, have, however, another

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ground of action—namely, estoppel. The class of estoppel is estoppel by conduct amounting to acquiescence. They say that the agreement was known to the company through the Lowes, two of the directors, and was allowed to continue. That if it had been disclosed after the initial advance that the arrangement, so far as the defendant company was concerned, was unauthorized, they would have made no further advances. They say further that apart from the knowledge of the Lowes an inspection of the books would have disclosed the arrangement, and that the company were guilty of negligence in not having examined its own books.

The state of knowledge of the various directors has already been set forth. It is quite clear that the only directors who did know were the Lowes, who were active agents in leading the plaintiffs to advances on an arrangement which they knew had not been authorized by the company.

My Lords, there can obviously be no acquiescence without knowledge of the fact as to which acquiescence is said to have taken place. The person who is sought to be estopped is here a company, an abstract conception, not a being who has eyes and ears. The knowledge of the company can only be the knowledge of persons who are entitled to represent the company. It may be assumed that the knowledge of directors is in ordinary circumstances the knowledge of the company. The knowledge of a mere official like the secretary would only be the knowledge of the company if the thing of which knowledge is predicated was a thing within the ordinary domain of the secretary's duties. But what if the knowledge of the director is the knowledge of a director who is himself particeps criminis, that is, if the knowledge of an infringement of the right of the company is only brought home to the man who himself was the artificer of such infringement? Common sense suggests the answer, but authority is not wanting.

In *In re Hampshire Land Co.* (1) Vaughan Williams L.J. expresses himself thus: "If Wills had been guilty of a fraud, the personal knowledge of Wills of the fraud that he had committed upon the company would not have been knowledge of the society of the facts constituting that fraud; because common sense at once leads one to the conclusion that it would be impossible to infer that the duty, either of giving or receiving notice, will be fulfilled where the common agent is himself guilty of fraud. It seems to me that if you assume here that Wills was guilty of irregularity—a breach of duty in respect of these transactions—the same inference is to be drawn as if he had been guilty of fraud. I do not know, I am sure, whether he was guilty of actual fraud; but whether his conduct amounted to fraud or to breach of duty, I decline to hold that his knowledge of his own fraud or of his own breach of duty is, under the circumstances, the knowledge of the company."

The same view is to be found in the case of *Lacey* v. *Hill.* (2) This law, in my view, applies to the present case. The only knowledge brought home to the company is through the Lowes and the secretary. They were all parties to the arrangement, which was a fraud on the true interests of the company.

It only remains to consider whether negligence on the part of the unincriminated directors can found an estoppel against the company. I am of opinion that it cannot. It is no part of a director's duty to inspect accounts every day. There was nothing in the circumstances to arouse the suspicions of the two directors as to the existence of any such agreement. As soon as they were all at home the whole thing was found out and the arrangement stopped, and to hold that there was estoppel because Walker, during the month of August, near the end of it, did not inspect the accounts and find out the arrangement, would be, in my

(1) [1896] 2 Ch. 743, 749. (2) (1876) 4 Ch. D. 537.

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opinion, going much beyond what has ever been decided against a company. I am therefore of opinion that the judgment of the Court of Appeal is right and that this appeal should be dismissed with costs, and I move accordingly.

VISCOUNT SUMNER (read by LORD BLANESBURGH). My Lords, I agree in the motion proposed by my noble and learned friend on the Woolsack.

The appellants' claim to retain as against the respondents part of the sale proceeds of their fruit rests on express contract or, in the alternative, on estoppel. The claim in contract really depends on the effect of the appellants' letter of July 16, 1924, to Mr. Maurice Lowe.

On Mr. Dart's letter it is quite plain: (1.) that the consignments to be dealt with were known to be the several property of Nothard & Lowe and of the respondent company, as the case might be; (2.) that the sales were to be made for the respective owners severally and not on any joint account; (3.) that all the money to be lent by the appellants was to be lent to Nothard & Lowe and to be secured by them, and none of it was to be lent to the respondent company; and (4.) that the appellants were not willing to take and did not ask for or get the acceptance of their terms from Nothard & Lowe or from Maurice Lowe on behalf of and as agent for the respondent company. They were not prepared to give credit to him, but required the latter company's independent written assent in their own names.

In the result, however, the letter that the appellants got, signed only by their secretary, could not bind the respondents, nor has it been contended that it did. The secretary had not, as such, any power to bind the respondent company by his signature to such an arrangement. Who had that authority was a question which depended on their articles, and it was the appellants' business to ascertain from them where the power resided and to see that it purported to have

been exercised. Under their articles only the Board of Directors could have bound the respondent company in this matter.

The appellants' case on the estoppel point is, that the respondent company, knowing that they were acting on the faith of the contract which purported to have been concluded between them, stood by and, apparently with assent and at any rate without objection, allowed them to change their position for the worse, upon the footing that the purported contract was valid. Of course, if this is made out, the respondents are beyond question estopped from disputing the contract.

How do the appellants essay to prove that the respondent company knew that the alleged agreement purported to have been made and had been acted on accordingly; a fact which they must establish or fail? They rely on two circumstances. One is, that the parties to the guarantee, Maurice Lowe and George Lowe, directors, and Prescott, secretary, of the respondent company, knew all about it. The other is that account sales were rendered to the respondent company, in which 70 per cent. of the proceeds of their goods were treated as attributable to the extinction of the loans to Nothard & Lowe and were retained accordingly, of which corresponding entries to the like effect were then made by their clerks in the respondent company's books. About the first there is no doubt. Of course the persons who gave the guarantee knew of the transaction which was its subject, and, as the respondent company's fruit department was managed by Maurice Lowe with the concurrence of the other two, we may assume their knowledge of the fact that the business was proceeding as arranged and that the respondent company's books contained entries in accordance with it. The question is whether either of these things or both carry the appellants any further.

When the case is clearly understood I think these entries in the respondent company's books become a mere matter

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of prejudice. Of course they are evidence against the respondent company, but evidence of what? Not of the company's knowledge of the 70 per cent. arrangement nor of the system on which the account sales were being prepared. Neither did they constitute any representation to the appellants, for they were never communicated to them. At any time they might have been corrected or cancelled without affecting the appellants' rights, nor was it on the faith of these entries, of which they were unaware, that the appellants acted or changed their position at all. The documents that really matter are the account sales. They did convey to those affected with knowledge of their contents what the respondents were doing and claimed to be entitled to do, but a company is not, without more, deemed to know what every letter received by it contains, so as to be estopped from asserting its rights unless those contents are promptly challenged.

Has knowledge then been brought home to the respondent company on which to found the alleged standing by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs, by which it receives knowledge so as to affect its rights, may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge, which is relevant, is that of directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers.

What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action, which a fully informed corporation would proceed to take on the strength of it.

There are two exceptions, however, to this rule, which are now material. The directors, other than the Lowes, did not in fact know till a late date what the Lowes had been doing, and when they found out they took prompt and proper action. The circumstances have been detailed by my noble and learned friend. It is plain, and I think uncontested, that they could not have been made personally liable for any neglect or misfeasance, and, if so, the company cannot be affected as if it had known from them, what they neither knew nor could have been expected to know under the system of domestic management established by the company. On the other hand, the Lowes knew everything all along, and if, by their keeping the matter to themselves, their company could be estopped from denying that it was bound by the 70 per cent. arrangement, they would have relieved themselves and Mr. Prescott from personal liability under their guarantee at the sacrifice of their company's interests. Their silence was accordingly a notable breach of duty. It has long been recognized that it would be contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency. Hence, for the purpose of estopping the company, some knowledge other than theirs has to be brought home to other directors, who can be presumed not to be concerned to suppress it. This was laid down, following earlier cases, in *In re Hampshire Land Co.* (1), and was even then treated as incontestable. So far as I know it has never been doubted since. If so, there was in this case no standing by and no estoppel. The

(1) [1896] 2 Ch. 743, 749.

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cases on which the above propositions are based were not contested by Sir John Simon in his reply, nor were any authorities cited which conflicted with them. It is not for us to dispute settled law, and accordingly the appeal fails.

LORD SHAW OF DUNFERMLINE. My Lords, a firm of the name of George Wills & Sons, Ld., and another firm of the name of the Nothard & Lowe Fruit and Preserving Co., Ld., had for some time traded in fresh fruit in Great Britain and other parts of the world in competition with each other. In the year 1920 they were minded to form a new company, "being desirous of promoting and protecting their trade and of facilitating and economising the working of such trade." These words are taken from the preamble of an agreement of date July 14 of that year, and the preamble states, and states accurately, that they, the two companies mentioned, "have been instrumental in forming a new company of which they are the sole shareholders." The new company was in short a combine, and will be so called in this judgment.

Certain business, however, and this is a matter which has caused some confusion, was, so to speak, reserved for the Preserving Company. For the purposes of this case the trade in apples purchased in Nova Scotia was trade reserved for Nothard, Lowe & Co., that is to say, for the Preserving Company. Other trade, including the large American trade, was to be the business of the combine.

In the practical working out of this scheme it was expedient and advantageous that various other things should be done. In the first place, the combine should be really a combine in the sense of belonging to the same body of shareholders as those of the former company. This was accomplished. Next, the interests of the two companies in the combine were practically halved. Thirdly, the purchases coming, say, from the other side of the Atlantic should be slumped so far as carriage was concerned, and from the first this also was done, the goods from Nova Scotia and those from other

parts being shipped in the same vessels and dealt with on arrival under the same agency.

Fourthly, as to management, the directors appointed were —two from the Wills Company—namely, Messrs. Walker and Braund—and two from the Preserving Company—namely, Messrs. Maurice Lowe and George Lowe. As will be afterwards seen, Mr. Maurice Lowe and Mr. George Lowe were directors, the former being the chairman of the Preserving Company, and Mr. Maurice Lowe became also chairman and George Lowe a director of the combine. Fifthly, when the apples arrived in this country they were, according to the practice of the trade, sold through brokers. Lastly, according to the ordinary practice of this trade, advances were made by brokers on the security of the goods to be sold and accounts were sent forward.

The new company or combine occupies the same office as the Preserving Company, Mr. Maurice Lowe being, as already stated, chairman of both companies and Mr. George Lowe a director. When the accounts arrived it was the duty of Mr. Maurice Lowe and his brother to segregate the business done and the receipts therefor according to the rights of the respective companies. With all that the brokers had no concern. I have no doubt whatsoever that in this distribution of the payments transmitted to London the defendant company of the combine treated, and were justified in treating, the Preserving Company as its agent not only for the receipt of the advances of their brokers but for the distribution as against the appropriate cargoes of the moneys received from those brokers for the respective cargoes. It is not unnatural that the letters should pass to and from the same office sometimes in the name of the one company and sometimes in the name of the other.

The defence and counterclaim by the defendants, however, set up the case that there was no such agency for the combine,

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and they contend that the plaintiff brokers, who unquestionably made the advances as against the total cargoes as already described, shall strike such advances out as against the combine and shall account to the combine for the proceeds of the apples realized in this country belonging to it and make payments therefor. The result would be, of course, that so far as the plaintiffs, the brokers, were concerned they would be in a position of making double payment in respect of the same goods. And so far as the combine is concerned, the result would be still more startling. It did not act as its own brokers, it required brokers not only to obtain delivery and realize the goods, but to make the advances necessary to release them. All this was done, and the combine now claims that it shall be credited with the goods and not debited with the advances made against them (without which they would not have been delivered).

In my opinion this demand of the combine is a mere juggle to defeat the plain equities of the case, and Wright J. promptly declined to sanction it.

The Preserving Company, being in embarrassed circumstances, has for some time past been putting the advances from the plaintiffs (unknown to them) to their own, the Nothard Lowe, account and not passing the payments, so it is alleged, into the combine, or Nothard, Lowe & Wills account. In the view which I take of the case, it is accordingly most necessary to see what were the actual arrangements when the advances from the plaintiffs were got.

I hold that the circumstances cannot be explained on any other footing than that these advances were made to both companies under the combined agency, that the responsibility for distribution inter se of the proceeds of cargoes lay with Nothard, Lowe & Co. and, particularly, with Maurice Lowe, the director of both companies, who, so far as the combine

was concerned, was the agent for receipt and distribution as already mentioned.

So far as the outside markets were concerned, this is how their advertisements represented them: "Nothard & Lowe and Nothard, Lowe & Wills, Ld., Cotton's Wharf, Tooley Street, S.E. 1; green fruit importers. We specialise in apples from all parts of the world, especially from Nova Scotia and then from various other parts, namely, Ontario, British Columbia, etc."

It is clear that a combination in the closest sense is thus intimated to traders.

The evidence and correspondence are voluminous, but after hearing the full argument I am of opinion that the judgment reached by Wright J., both upon the facts and the law of the case, is sound.

I see no reason for doubting the evidence of Mr. Dart, the senior partner in the plaintiff firm; it was uncontradicted, neither of the Messrs. Lowe giving evidence in the case; and what was said by Mr. Dart is confirmed both by the correspondence and the acting of parties. There being a desire to transfer the brokerage business to the plaintiff firm, Mr. Dart in December, 1923, met Mr. Walker, one of the directors who had formerly been a director of the Wills Company, and, as Mr. Walker himself states in his evidence, "I told him (Mr. Dart) Mr. Maurice Lowe was looking after the selling end of the business." Without any doubt Mr. Maurice Lowe was doing, and continued to do, this. Mr. Dart's account of the interview is, that he, Walker, said, "You do not sell any of our apples and Maurice Lowe has the control of our apples and I will talk to him." It does not appear to me to be reasonable to say that Mr. Maurice Lowe was represented to be acting merely for his own firm, of which Mr. Walker was not a partner. The view taken was that which was reasonable—namely, that Mr. Maurice

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Lowe was representing the new company and all the business done, whether by the old or the new.

It may now be mentioned that this manner of trading with brokers and of pooling and adjustment of accounts was by no means new, but had continued for years. One of the agents of the combine concerned was the Manchester Fruit Brokers, Ld., who, on December 19, 1922, wrote to Nothard & Lowe: "As we have only the one account in our ledger, namely, in the name of Nothard & Lowe, we shall feel much obliged if you will kindly endorse the bills of lading accordingly in order to regularise matters." To this Messrs. Nothard & Lowe replied:—

"We are afraid we cannot do this as the bills of lading are made out to Nothard, Lowe & Wills, Ltd., and if we were to endorse them as Nothard & Lowe we would not be able to take delivery of same.

With reference to this, it will not matter in any way if you place it to Nothard & Lowe's account; we will adjust and place to the proper account when we receive same from you."

Similarly, in October, 1923, Messrs. James Adams, Sons & Co. of Liverpool wrote to Mr. Maurice Lowe: "As arranged we send you herewith cheque for 5000*l.* and perhaps you will be good enough to let me know if it is your wish that we should keep all your consignments under one account. So far the account in our books appears as Nothard & Lowe, and it would perhaps be more convenient if we continued in this way."

The answer to this on the following day was: "Many thanks for yours enclosing 5000*l.* to hand, and I shall be glad if you will kindly keep this under one account, as it makes things easier and we can do the adjusting this end." This was signed, "per pro Nothard & Lowe, B. Metcalfe for Maurice A. Lowe." It may be noticed that the one account which is here referred to is an account headed "Messrs. Nothard, Lowe & Wills, Ltd."

These instances are only given to show the completeness of

what may be called the combination of the new firm, and the duty which it, through its chairman, undertook of adjusting the accounts as between the new and the old firm. I decline to believe that this course of business, including the dealings with large quantities of goods and the receipt of large remittances from brokers, which remittances were adjusted by the new firm in accordance with the rights of each constituent part—that all this was not perfectly well known to all engaged in managing the affairs of the combined company, including its directors. The case, accordingly, is not one in which it can be alleged that there was any novelty in brokers making these advances upon the goods of both companies and dealing on joint account.

This being the ordinary course of business, the transactions with which the present case has to do may be said to have begun by the following letter, written by Mr. Dart to Mr. Maurice Lowe :—

" I understand that you wish my firm to advance to Messrs. Nothard & Lowe 10,000*l.* now, and another 5000*l.* on 25th August, and a final 5000*l.* some time in September, making a total of 20,000*l.*, and that you would give us the deeds of your packing house as security, which are worth some 13,000*l.* Presumably, these documents you will have recorded at the Registry of Deeds in the usual way. You will guarantee a minimum of 15,000 barrels of Nova Scotian apples. Besides your Nova Scotian fruit, we will receive free of advance all the goods consigned to Messrs. Nothard, Lowe & Wills at Liverpool and the total of the two firms would amount to about 150,000 packages. We would keep back 70 per cent. of the net proceeds whether the goods belonged to your firm or to Messrs. Nothard, Lowe & Wills. I should presume the arrangement with respect to Messrs. Nothard, Lowe & Wills would have to be subscribed to by them."

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On the 17th, Mr. Maurice Lowe replied :—

"We agree that we will give you all goods consigned to the firm of Nothard, Lowe & Wills, Ltd., at Liverpool. . . . . You could keep back 70 per cent. of the goods whether they belong to our firm or to Nothard, Lowe & Wills, Ltd."

And, on July 22, Messrs. Nothard, Lowe & Wills wrote by their secretary to the appellants as follows :—

"Dear Sirs,

We confirm the arrangement made with you to the effect that the proceeds of any shipments of fruit sold by you on our behalf are to be placed by you in reduction of advances made to Messrs. Nothard & Lowe in the same proportion and on the same basis as the proceeds of shipments handled by you on behalf of Messrs. Nothard & Lowe. We shall, in accordance, credit the proceeds of such sales against the advances above referred to."

It seems to me that the three things, the pooling of the cargoes, the making of advances by the plaintiffs in respect of the cargoes so pooled, and the doing so on one account are proved to have been matters of agreement as to the manner in which this business should be conducted. Had the plaintiffs not conformed to that agreement and had they declined to make the advances, a question might have arisen as to the respective powers of those signing these letters for the respective companies, and the companies might have declined to have been bound. But once the advances were made, all such defects of authorization appear to me to have been cleared away; the assumedly inchoate arrangements became an agreement which was complete. The principle of such completion is the familiar one both in England and Scotland, as approved and explained by Lord Selborne in *Maddison* v. *Alderson*. (1)

(1) (1883) 8 App. Cas. 467.

I shall show in a few moments that the large sums mentioned in these letters, amounting in all to 20,000*l.*, were actually advanced. The payments were accepted and goods were realized on one account and the entire transactions were carried out on this one joint account. To these circumstances it appears to me that the judgment of Lord Campbell L.C. in *Cairncross* v. *Lorimer* (1) is applicable: "The doctrine will apply which is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained—he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

A difficulty in deciding this case upon this ground is said to arise in consequence of the fact that subsequent to the letters above quoted a written agreement was entered into of date July 22, 1924. That was an agreement between Nothard & Lowe Preserving Company and the two Messrs. Lowe and Prescott, the secretary, as so called guarantors these on the one part and the appellants, the brokers, on the other part. It confirms the arrangement in the letters, adds to it the guarantee and undertakes to consign not less than 50,000 barrels of Nova Scotian apples, making provision for the retention, after advance of 10,000*l.*, of the 70 per cent. of the net proceeds that would arise from the sale of those apples. It does not specifically mention the 120,000 tons of apples consigned to Liverpool to the combined company of Nothard, Lowe & Wills, Ld., but clause 6 of the agreement is in these terms: "For the consideration aforesaid, the

(1) (1860) 3 Macq. 827, 829.

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company and the guarantors hereby jointly and severally undertake that the agents shall be entitled to retain and apply in or towards repayment of the said advances 70 per cent. of the net proceeds of the sale of goods sold on behalf of, or as agents for, Nothard, Lowe & Wills, Ltd."

There is, however, no separate agreement between this combined company and the appellants, as brokers. Had there been, the question would have been at an end; but clause 6 above quoted seems undoubtedly not to go one step further than the arrangement embodied in the letters, because these letters covered goods from the combine and, in point of fact, the apples to be dealt with by the brokers included, along with the 50,000, 120,000 tons belonging to the combine. The reference in clause 6 of Nothard & Lowe's agreement is a reference to an actual fact, an arrangement made, and it was upon the footing of that arrangement, which included the combine and its apples, that the advances were made.

I should incline to the opinion that the letters in themselves form a complete and effective contract. Personally, I do not think it required to be followed by a formal agreement. I think it was in re mercatoria operative and effective.

But for the reason about to be stated, I think this question, in the circumstances of this case, need not be so viewed in the abstract, for the actings of all parties, the combine and the Preserving Company and the brokers, proceeded from day to day and from consignment to consignment upon the important footing that, on the one hand, large advances were made in cash and, on the other, they were so made as against goods pooled in the manner described. I can hardly bring myself to believe that the law can sanction resiling

from a contract so acted upon, to the brokers' great loss. It is an admitted fact that there is no element of fraud in the case; the advances were honestly made, and, in my opinion, the demand of the combine, which embraces a claim for payment again to them of the price of all their goods so realized, cannot be justified in law.

The testing point of fact is that, upon the realization of the apples received, the appellants, as brokers, having previously made advances, were to retain 70 per cent. of the price and remit 30 per cent. to the companies. Was the allocation of that 30 per cent. and 70 per cent. respectively made? The answer is that it was made in repeated transactions following, say, in the months of August, September and October, 1924, and the further answer is that it was made to the knowledge of all parties.

To give one instance from the accounts: On September 5 apples ex the *Celtic* and the *Cythia*, amounting in net value to two sums of 429*l.* and 423*l.*, in all 852*l.*, were sold. How was this sum disposed of? In point of fact, these two sums appear on the credit side of the account in order, but upon September 6 not 825*l.* but 255*l.*, being 30 per cent. thereof, are debited to the defendants. That is to say, on the very face of the accounts it appears clear that 70 per cent. has been retained and 30 per cent. paid, all as per the arrangement in the letters described. Other instances might be given appearing from the accounts, and it is beyond all question clear that the brokers were carrying out, on their part, the three things which they had to do—namely, make advances, realize the goods and remit 30 per cent. thereof to the vendors.

This is admitted to be in no way an unusual transaction, and large masses of business appear to be carried out on the same footing. It may be said, however, that this was done behind the backs and without the assent of the combine.

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The fact is the other way, the entries showing the distribution of the realizations in 30 and 70 per cent. appear from Messrs. Houghton's, the appellants', account in the defendants', the combine's, own ledger. That is to say, that the combine stands committed in its own books to the 30 plus 70 per cent. arrangement. When it is noted that the demand of the combine now is that, notwithstanding this, they shall now demand that 70 per cent. and refuse to give credit for the advances which the brokers were making, it will be seen how important in mercantile circles the case comes to be.

As to the advances themselves, the first 10,000*l.* was, in fact, advanced by the plaintiffs on July 28. The cheque was made payable to Nothard & Lowe, but the receipt was in the following terms :—

"30th July, 1924.

Messrs. Nothard & Lowe received from Messrs. J. Houghton & Co. cheque value 10,000*l.*, ten thousand pounds.

Received with thanks.

10,000*l.*

30th July, 1924.

NOTHARD, LOWE & WILLS, LTD.

GEORGE H. KEY."

This was the very first of the advances made which are now challenged as having been paid under any agreement with which the combine had nothing to do. I do not think it is open for the combine, whose receipt has just been quoted, to deny the receipt of that money either for itself or as a payment made into the joint account.

Turning again to the combine's own books and to the account appearing in their own ledger, the first item of the

allocation into 30 per cent. and 70 per cent. appears therein as on August 22, 25, 1924. Such a transaction was not repudiated; their accounts show that it was accepted, and a further instalment was advanced on the very next day, August 26, 2000*l.* The advances of September 5 and 6 giving the same allocation of 30 per cent. to the owner and 70 per cent. to the advancing broker were preceded by one day by an advance of 3000*l.* At the end of September, on the 26th, similar transactions of considerable amount took place as to the allocation of the 30 and 70 per cent., and 5000*l.* was advanced on October 7 following by the appellants. It appears to me impossible either in law or equity for the defendants to repudiate a transaction so followed up in important particulars from month to month. In my humble judgment estoppel has been established, even on the assumption, which I myself could not make, that there was no concluded contract under the documents. It appears to me to be well established in this case that the combine is not entitled to put forward such a claim, having been committed to the course of dealing which I have described by illustrative instances. Of one thing there is no doubt, that had it been indicated to the appellants that they were to make these advances without the security of the retention of the 70 per cent. of the proceeds of the cargoes, such advances would not have been made. The case has arisen solely because the combine and the companies constituting it have not sufficiently attended to the correct distribution of the moneys transmitted; the distribution inter se has been negligent. With such things, it does not appear to me that the appellants, the brokers, who acted and advanced their money honestly throughout, have anything to do. They can, in my view, have no bearing as against an innocent third party, upon the plea of estoppel.

After much consideration I am of opinion that the judgment

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of Wright J. should be restored and that the appellants should succeed.

LORD CARSON. My Lords, I agree with the noble Viscount on the Woolsack that this appeal fails. Looking at the contract of July 22, 1924, I think it is clear that the appellants were contracting with the Nothard & Lowe Fruit and Preserving Company, Ld., alone and not with the defendant company, which in no way is made a party. It is formally executed on behalf of the said company by Maurice Lowe and another director, and also by the secretary (Mr. Prescott) of the said Preserving Company, and, in addition, it is executed by Maurice Lowe, George Nothard Lowe and the said Prescott as guarantors in their personal capacity up to the extent of 10,000*l*. It is not suggested on the face of the contract, nor is it a fact, that the moneys to be advanced were in whole or in part for the benefit of the defendant company—on the contrary, the advance is truly stated to be made to the Preserving Company. The agreement, it is to be observed, is strictly in accordance with the terms of the letter of July 16, 1924, written by Dart to Maurice Lowe (already quoted), and which upon the face of it states that the advance is to Nothard & Lowe, and that the goods which were to be received by them for sale on behalf of the defendants were to be free of advance. The question, therefore, of authority in Maurice Lowe to render the defendant company liable for the repayment of a loan made to another company does not, in my opinion, arise, as on the face of the documents it appears clear that he never purported to do any such thing, nor did the appellants even require that the defendant company should be made a party to the agreement. This is made still clearer by the terms of the letter referred to of July 16, 1924, in which Mr. Dart, as agent for the appellants, himself states: "I should presume the arrangement with respect to Messrs. Nothard, Lowe & Wills would have to be subscribed by them." It is said, however, that the letter of July 22, 1924, purporting to be signed on behalf of the defendant company, by the same Mr. Prescott as secretary,

is binding upon the defendant company. My Lords, I cannot find a particle of evidence that Mr. Prescott had any authority, actual or ostensible, to write such letter on behalf of the defendant company, or to create any such obligation as it purports to create, on the part of the defendant company; and I find it difficult to understand how the appellants could have been satisfied that Prescott had any such authority to enter into an agreement by which the proceeds of sale of the defendant's apples was to be made liable for a debt of another company and from which they derived no benefit. In addition, the appellants knew that Prescott was a director and secretary of the Preserving Company and was himself one of the guarantors of the advances proposed to be made to that company.

Finally, the appellants raised, by an amendment of their original statement of claim, the question that the defendants were estopped from denying the agreement by reason of the method adopted for carrying on the business. The appellants mainly relied upon the fact that it appeared from the defendant's books that in case of apples, the subject-matter of the agreement, at first only 30 per cent. and ultimately no part of the proceeds were remitted to the defendant company, and this they alleged would be apparent at once to any one looking at the books. My Lords, of course if it was shown that the defendant company had notice of the course of dealings disclosed by the books there would be great force in their contention. But the only persons who had notice were the Lowes and the staff of the Preserving Company, by whom under the arrangements entered into the books were kept. It is, in my opinion, impossible to hold that the knowledge of the Lowes or of the Preserving Company, who were the very persons who were obtaining a loan for themselves, which as the Lowes knew was not authorized by the defendant company was notice to the defendant company. Apart from such knowledge there is no evidence that the defendant company through their other directors had any notice whatever, and in my opinion this contention also fails. I agree that the appeal should be dismissed with costs.

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VISCOUNT DUNEDIN. My Lords, I am authorized by my noble and learned friend Lord Atkinson to say that he concurs in the judgment which I have delivered.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 7, 1927.

Solicitors for the appellants: *Gregory, Rowcliffe & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for the respondents: *Kimber Bull, Howland, Clappé & Co.*

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TARN . . . . . APPELLANT;

AND

SCANLAN . . . . . RESPONDENT.

NIELSEN, ANDERSEN AND COMPANY APPELLANTS;

AND

COLLINS . . . . . RESPONDENT.

W. H. MULLER AND COMPANY (LONDON), LIMITED . . . . . APPELLANTS;

AND

LETHEM . . . . . RESPONDENT.

W. H. MULLER AND COMPANY (LONDON), LIMITED . . . . . APPELLANTS;

AND

COMMISSIONERS OF INLAND REVENUE RESPONDENTS.

Revenue—Income Tax—Excess Profits Duty—Foreign Shipping Company—Exercise of Trade within United Kingdom—Liability of Resident to Assessment as Agent—Sub-agent—Appeal from Special Commissioners—Practice—Setting down Case—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sch. D—Finance (No.* 2) *Act*, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 31, *sub-ss.* 2, 7; 38, 39 *and* 45.

With a view of avoiding delay in bringing before the Court revenue appeals on cases stated by the General or Special Commissioners, henceforward points of argument need not be delivered and the case may be set down by either party.

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD ATKINSON, LORD SHAW OF DUNFERMLINE, and LORD CARSON.

A Danish company and an English company established a line of steamers between Copenhagen and Hull, and the English company were appointed exclusive agents for the Danish company at Hull. The English company controlled the freights at this end, quoted rates, accepted consignments of goods and put them on board the steamers of the Danish company. The bills of lading were signed "for the master" by one of the English company's clerks. The English company collected the freights for outward bound goods and any other moneys due from the consignors, and remitted what was due to the Danish company.

On an appeal against assessments to income tax for the four years ended April 5, 1913–1916 of the English company as agents for the Danish company:—

Held, (1.) on the principle of *Erichsen* v. *Last* (1881) 8 Q. B. D. 414, that the Danish company exercised a trade in the United Kingdom to the extent to which goods were taken on board their ships at Hull for carriage elsewhere, and (2.) that this trade was carried on by the British company as their regular agents.

Held, therefore, that the Danish company were assessable to income tax in the name of the British company for the three years ended April 5, 1915, under s. 41 of the Income Tax Act, 1842, in respect of the profits arising from such trade, so far as regards freights collected by the British company in respect of such goods, and for the year ended April 5, 1916, under the said section (41) as amended by s. 31 of the Finance (No. 2) Act, 1915, in respect of all the profits arising from such trade, whether the freights were collected by the British company or not.

Opinion of Lord Herschell in *Grainger & Son* v. *Gough* [1896] A. C. 325, 337 followed.

Decisions of the Court of Appeal in *Tarn* v. *Scanlan* and *Nielsen, Andersen & Co.* v. *Collins* affirmed.

Two Dutch shipping companies owned four steamships known as the Batavier Line which traded regularly between Rotterdam and London. A Dutch firm, W. H. M. & Co., were the directors and had the management and control of both companies and were also the shipping agents of both companies. By an agreement in 1899 made between the Dutch firm and one of the companies the firm were authorized to appoint sub-agents, where they deemed it necessary. In 1904, and again 1916, the Dutch firm appointed the appellants sole agents in London of the Batavier Line and thereafter the appellants did all that was required to be done in connection with the ships of the Batavier Line in London. Assessments to income tax (for the years ended April 5, 1916 and 1917) and excess profits duty having been made on the appellants as agents of the Dutch companies in respect of the profits of their business of shipowners, the Court of Appeal held that the Dutch companies were exercising a trade in the United Kingdom through the appellants as their agents and were chargeable to income tax in respect of the profits derived from such trade, subject to the limitation imposed by *Maclaine & Co.* v. *Eccott* [1926] A. C. 424 in the case of transactions between non-residents:—

Held, (1.) that the Dutch companies were exercising a trade in the United Kingdom, and (2.) that, even assuming that the Dutch firm,

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in appointing the appellants as agents, acted as shipping agents and not as directors, they nevertheless constituted the appellants direct agents of the two Dutch companies in London.

Opinion of Thesiger L.J. in *De Bussche* v. *Alt* (1878) 8 Ch. D. 286, 310 followed.

Decision of the Court of Appeal in *W. H. Muller & Co. (London), Ld.* v. *Lethem*; *Same* v. *Inland Revenue Commissioners* [1927] 1 K. B. 780 affirmed.

THESE four appeals were considered together.

TARN *v.* SCANLAN.

NIELSEN, ANDERSEN AND COMPANY *v.* COLLINS.

Appeals from a decision of the Court of Appeal (Lord Hanworth M.R., Scrutton L.J. and Romer J.) affirming a decision of Rowlatt J., which affirmed decisions of the Commissioners for the Special Purposes of the Income Tax Acts.

The questions raised by both appeals were the same: (1.) whether a non-resident Danish shipowning company exercised any trade in the United Kingdom, as the result of contracts made and services performed in the United Kingdom in regard to the carriage of goods, within the meaning of Sch. D, and (2.) whether a company resident in this country was assessable in respect of the profits arising to the Danish company from any such trade, as being an agent for a non-resident person under s. 41 of the Income Tax Act, 1842, or under that section as amended by s. 31 of the Finance (No. 2) Act, 1915.

In *Tarn* v. *Scanlan* the appellant appealed to the Commissioners against assessments to income tax for the years ended April 5, 1913, 1914, 1915 and 1916, made upon him as secretary to Thomas Wilson, Sons & Co., Ld., shipowners and shipbrokers of Hull, for a Danish shipping company called Det Forenede Dampskibs Selskab (hereinafter referred to as "Det Forenede").

The facts sufficiently appear from the opinion of the Lord Chancellor and they are summarized in the headnote.

The Commissioners determined that a trade was carried on in the United Kingdom by Det Forenede to the extent to which goods were taken on board its ships at Hull for carriage elsewhere and that Thomas Wilson, Sons & Co. were their agents having the receipt of the profits arising therefrom so far as regards freights collected by them in respect of such goods, and they accordingly decided that for the three years ended April 5, 1915, the assessments should be restricted to the profits on goods shipped c.i.f. from the United Kingdom, whilst for the subsequent year the profits on all goods shipped from the United Kingdom should be included in the assessment.

In *Nielsen, Andersen & Co.* v. *Collins* the appellants, who were shipbrokers of Newcastle-upon-Tyne, appealed to the Commissioners against assessments to income tax made upon them as agents for Det Forenede for the years ended April 5, 1914, 1915 and 1916. This case was indistinguishable in its facts from the last. The Commissioners held that a trade was carried on in the United Kingdom by Det Forenede to the extent to which goods were taken on board its ships at Newcastle for carriage to Denmark and that the appellants were its agents in whose name it was assessable to income tax for the years ended April 5, 1914 and 1915, in respect of the profits arising from such trade, so far as regards freights collected by the appellants in respect of such goods, and for the year ended April 5, 1916, in respect of all the profits arising from such trade, whether the freights were collected by the appellants or otherwise.

The subsequent appeals in these two cases were heard together before Rowlatt J. and in the Court of Appeal, and also in this House, and the counsel and solicitors were the same in each case.

1927. July 12, 14. *Sir John Simon K.C.* (with him *Latter K.C.* and *Cyril King*) for the appellants.

1. In the circumstances stated in the case there was no exercise by the Danish company of a trade within the United Kingdom. A non-resident carrying goods or rendering services

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outside the United Kingdom does not exercise his trade within the United Kingdom, even if the contracts relating to such carriage or services are made within the United Kingdom. The profits of the Danish company did not arise on the signing of the bills of lading but upon the carriage of the goods outside the United Kingdom. *Erichsen* v. *Last* (1), upon which the Court of Appeal relied, is distinguishable, because in that case the foreign company had offices of its own in the United Kingdom and a staff of its own in each office. The Court of Appeal failed to give effect to the distinction drawn by Lord Herschell in *Grainger & Son* v. *Gough* (2) between trading with a country and exercising a trade within a country.

[He also referred to *Greenwood* v. *Smidth & Co.* (3); *Hoystead* v. *Commissioner of Taxation* (4); *Maclaine & Co.* v. *Eccott.* (5)]

2. The Danish company was not chargeable to income tax in the name of the appellants as agents either before or after the passing of the Finance (No. 2) Act, 1915. In order that a non-resident principal may be assessed to tax on the profits of a trade exercised within the United Kingdom such trade must be exercised within the United Kingdom by or through the agent sought to be assessed. On the facts no trade was exercised by the Danish company at any time within the United Kingdom by or through the appellants. The appellants were agents for the consignors and in the course of their business were concerned in the forwarding of the goods. They did not contract to carry the goods to Denmark. In the case of profits resulting from the making of contracts the person who brings about the profit is the person who makes the contract: see Lord Watson's explanation of *Werle & Co.* v. *Colquhoun* (6) in *Grainger & Son* v. *Gough.* (7) The fact that the so-called agents engage in a series of collateral transactions which lead to a profit being earned by their principal does not make them agents for the purposes

(1) 8 Q. B. D. 414.
(2) [1896] A. C. 325, 335.
(3) [1922] 1 A. C. 417.
(4) [1926] A. C. 155.
(5) [1926] A. C. 424, 432.
(6) (1888) 20 Q. B. D. 753.
(7) [1896] A. C. 325, 339–40.

of the Income Tax Acts. Further, it is submitted that the receipt of gross profits is not the receipt of profits or gains chargeable to tax within s. 41 of the Income Tax Act, 1842. This was the view of Lord Davey in *Grainger & Son* v. *Gough*. (1) Lord Herschell, however, took the contrary view. Before 1915 the agent must have made the contract and got the money. The Act of 1915 strikes out the condition as to getting the money, but it does not alter the fact that he must have made the contract.

Sir Douglas Hogg A.-G. (with him *Reginald Hills*) for the respondents. Two points arise on this appeal: (1.) liability; (2.) machinery. The question of liability is a question of fact. The finding of the Commissioners is binding if there is evidence to support it, and there is here ample evidence of the exercise of a trade in the United Kingdom. This case is directly covered by the dicta of the Court of Appeal in *Erichsen* v. *Last*. (2) Jessel M.R. there says: "A company in this country who regularly undertake the carriage of goods abroad for money as part of their ordinary business carry on trade in this country, although the whole of the carriage is done abroad. The mere fact that they enter into contracts in this country with English subjects for the right of carriage appears to me to be the same thing as if they were to make similar contracts for the sale of goods." Brett L.J. says: "Wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England, because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." Cotton L.J. was to the same effect. Those dicta were accepted by Lord Herschell and Lord Watson in *Grainger & Son* v. *Gough* (3) and by Viscount Cave L.C. and Lord Shaw in *Maclaine & Co.* v. *Eccott*. (4)

2. As to machinery: When once liability is established the presumption is that Parliament will have devised some

(1) [1896] A. C. 325, 337, 347.
(2) 8 Q. B. D. 414, 417, 418, 420.
(3) [1896] A. C. 325, 335, 340.
(4) [1926] A. C. 424, 433, 438.

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effective machinery for enforcing that liability: *Drummond* v. *Collins* (1); *Whitney* v. *Inland Revenue Commissioners*. (2) Approaching s. 41 of the Income Tax Act, 1842, and s. 31 of the Finance (No. 2) Act, 1915, with this principle in mind it is not necessary to give them so narrow a construction as has been contended for. But on the facts this argument is academic. It is true that the appellants acted as forwarding agents, but quite apart from that the Danish company made profits in transactions in which the appellants were acting for the shipowners. They arranged the whole contract. There was ample evidence upon which the Commissioners could find that the appellants were agents having the receipt of the profits and gains of the Danish company and were authorized persons carrying on the regular agency of the Danish company.

Sir John Simon K.C. replied.

The House took time for consideration.

W. H. MULLER AND COMPANY (LONDON), LIMITED *v.* LETHEM.

W. H. MULLER AND COMPANY (LONDON), LIMITED *v.* INLAND REVENUE COMMISSIONERS.

Appeals from a decision of the Court of Appeal (Lord Hanworth M.R., Scrutton L.J. and Romer J. (3)) affirming a decision of Rowlatt J.

The first appeal related to assessments of the appellants to income tax as agents for two Dutch companies, the Nederland Steamboat Company and the General Shipping Company, for the years ending April 5, 1916 and 1917. The second appeal, which related to assessments to excess profits duty, was governed by the first. The facts are fully stated in the report of the case before the Court of Appeal and are summarized in the headnote.

1927. July 15. *Latter K.C.* (with him *Beecroft*) for the appellants. (1.) In the circumstances stated in the case

(1) [1915] A. C. 1011, 1019. (2) [1926] A. C. 37, 52.
(3) [1927] 1 K. B. 780.

there was no exercise of trade within the United Kingdom by the Nederland Steamboat Company and the General Shipping Company. (2.) The appellants were not the agents of either of those companies within s. 41 of the Income Tax Act, 1842, or at all. They derived their authority solely from the Dutch firm, and there was no privity of contract between them and the two Dutch shipping companies: Bowstead on Agency, 6th ed., art. 41; *Lockwood* v. *Abdy* (1); *New Zealand and Australian Land Co.* v. *Watson.* (2)

Sir Douglas Hogg A.-G. and *Sir Thomas Inskip S.-G.* (with them *Reginald Hills*) for the respondents. The business to be taxed was the business of carrying goods between England and Holland. That business was manifestly carried on in London. Therefore the Dutch shipowning companies were carrying on a business in the United Kingdom. As the Dutch companies are not here and it is their business which is being carried on in London, it follows that it is the London agents who are carrying it on. They are the de facto agents. It is not admitted that this is a sub-agency. Here the head agents are in fact the sole managers and directors by whom the Dutch companies act. The reasonable inference is that the London firm were the agents of the Batavier Line, i.e., the two companies: *De Bussche* v. *Alt.* (3)

Latter K.C. replied.

The House took time for consideration.

1927. Nov. 7. VISCOUNT CAVE L.C. My Lords, these four appeals raise questions as to the liability of foreign companies to be assessed to income tax or excess profits duty in the names of certain persons as their agents, and it is convenient to deal with them together.

TARN *v.* SCANLAN.

In *Tarn* v. *Scanlan* the facts, as found by the Commissioners for the Special Purposes of the Income Tax, are that a Danish shipping company referred to in the case as Det Forenede,

(1) (1845) 14 Sim. 437. (2) (1881) 7 Q. B. D. 374.
(3) 8 Ch. D. 286, 310.

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and an English company referred to as Wilsons, established by agreement between themselves a regular line of steamers between Copenhagen and Hull; that it was a term of the agreement that Wilsons should be the exclusive agents for Det Forenede at Hull during the continuance of the agreement; and that Wilsons, besides acting as forwarding agents for English consignors of goods to be forwarded from Hull to Copenhagen, controlled the freights at this end, quoted rates of freight to the consignors, arranged room on the steamers (either their own or Det Forenede's) and employed stevedores to put the goods on board. No written contract was usually entered into prior to the signature of the bill of lading, but the bill of lading was signed "for the Master" by one of Wilsons' clerks. Wilsons collected the freight for outward-bound goods and any other moneys due from the consignors, and remitted what was due to Det Forenede.

On these facts the questions arising were: (1.) whether during the years in question (the tax years 1913 to 1916) Det Forenede exercised a trade within the United Kingdom so as to be chargeable under Sch. D of the Income Tax Acts with tax on the profits and gains of such trade; and (2.) whether they were so chargeable in the name of Wilsons, who are represented by the appellant Tarn. Rowlatt J. and the Court of Appeal have answered both questions in the affirmative, and Tarn appeals to this House. There is no question as to the amounts of the assessments.

As to the first question, I feel no doubt that Det Forenede did carry on a trade here to the extent to which goods were taken on board their ships at Hull for carriage elsewhere. It might be enough to say that the Commissioners have so found, and that there was ample material on which they could base that finding; but it may be added that, in my opinion, according to the tests laid down in *Erichsen* v. *Last* (1) and in later cases, including several decisions in this House, they could hardly have arrived at any other conclusion.

The second question depends, as to the first three tax-years involved (namely, the years 1912–1913, 1913–1914,

(1) 8 Q. B. D. 414.

and 1914–1915), on the effect to be given to s. 41 of the Income Tax Act, 1842, and as to the fourth tax-year (namely, the year 1915–1916), on the construction of that section as modified by s. 31 of the Finance Act, 1915.

Sect. 41 of the Act of 1842 provides that any person not resident in Great Britain, whether a British subject or not, shall be chargeable with tax in the name of "any factor agent or receiver, having the receipt of any profits or gains arising as herein mentioned, and belonging to such person, in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof"; and the agent so described is made answerable for the tax and is authorized (by s. 44 of the Act) to retain the amount out of moneys coming to his hands. Upon these sections it is argued on behalf of the appellant that the agent so to be made liable must be an agent actually carrying on the business in respect of which the charge arises and entering into the contracts incident to such business, and that Wilsons, although they performed certain services in connection with the business of Det Forenede at Hull, did not actually carry on that business and enter into the contracts. For myself I should be prepared to follow the opinion expressed by Lord Herschell in *Grainger & Son* v. *Gough* (1), and concurred in by Lord Macnaghten in the same case, and to hold that persons who were agents for some purpose connected with a trader's business and who received the gross proceeds (in which the net proceeds are included) were agents in whose name the trader could be assessed under s. 41. But the question hardly arises in the present case; for on the facts found by the Commissioners Wilsons were the exclusive agents for Det Forenede at Hull, quoted freights, accepted consignments of goods, and put them on board the steamers of Det Forenede, and I think it clear that they actually carried on the business and entered into the contracts for the carriage of the goods even though the bills of lading were signed by their clerk for the master of the vessel. In my

(1) [1896] A. C. 325, 337.

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opinion Det Forenede were chargeable with tax in their name.

As regards the tax year 1915-1916, s. 41 of the Act of 1842 is extended by s. 31 of the Finance Act, 1915, so as to make a non-resident person chargeable to income tax in the name of his agent, although the agent may not have the receipt of the profits and gains of the non-resident; and the section provides (by sub-s. 2) that a non-resident person shall be chargeable in respect of any profits or gains arising whether directly or indirectly through or from any agency and shall be so chargeable in the name of the agent, and (by sub-s. 6) that nothing in s. 41 of the Act of 1842 as amended shall render a non-resident person chargeable in the name of a broker or general commission agent or in the name of an agent not being an authorized person carrying on the non-resident's regular agency in respect of profits or gains arising from sales or transactions carried out through such a broker or agent. This section is not a charging section, but it modifies the machinery by which a non-resident person carrying on a business here may be reached by enabling the revenue authorities to assess and charge him in the name of an authorized person carrying on his regular agency, even though such agent may not have the receipt of the profits or gains of the non-resident. To this section, therefore, Lord Herschell's opinion above referred to does not apply, and the only question to be determined is whether Wilsons were authorized persons carrying on the regular agency of Det Forenede. The Commissioners held that they were, and upon the facts which they found I see no reason for questioning their decision. On this point, as on the other, I agree entirely with the opinion of Rowlatt J. and the Court of Appeal, and I think that the appeal fails.

My Lords, both Rowlatt J. and Scrutton L.J. commented severely on the delay which had occurred between the date in the year 1919 when the case first came before the Commissioners for Special Purposes and the date in 1926 when it was brought before Rowlatt J. for decision, and no doubt the dates are startling. Neither Rowlatt J. nor Scrutton L.J.

pronounced any opinion as to who was to blame for the delay; but they said, and said truly, that there must be something wrong in a system under which it took so long to settle the amount of a tax payable to the State. On these comments being brought to my notice I made some inquiries, with results which justify the hope that the procedure will henceforth be expedited. Rowlatt J., with the sanction of the Lord Chief Justice, has directed that "points of argument," which it has for some time been the practice to exchange in these cases and which in some instances have caused delay, need no longer be delivered; and also that a case may be set down, not by the appellant only, but by either party. With the assistance of these directions, and with greater insistence by the Commissioners on the need for expedition, it may be that delay such as that which aroused comment in this case will henceforth be avoided.

NIELSEN, ANDERSEN AND COMPANY *v.* COLLINS.

In *Nielsen, Andersen & Co.* v. *Collins* the facts found by the Special Commissioners are very similar to those found in *Tarn* v. *Scanlan*. Det Forenede have a line of steamers running between Copenhagen and Newcastle, and the appellants, Nielsen, Andersen & Co., are their agents at Newcastle, accept goods for carriage from that port to Copenhagen, put them on board the ships of Det Forenede, collect the outward freights, and remit them to the company. In this case, as in the other, no written contract is entered into prior to the bill of lading, but a clerk in the employ of the appellants, who is lent to the master of the ship for that purpose, prepares the manifest and signs the bill of lading for the master. The years for which the assessments in this case were made were the years ending on April 5, 1914, 1915, and 1916.

In my opinion the considerations which apply to the appeal in *Tarn* v. *Scanlan* apply equally to this appeal, and this appeal also must fail.

In the course of the argument attention was drawn to the circumstance that in respect of each of the years in

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question the Commissioners had made an allowance for wear and tear equal to the assessment in respect of profits, with the result that no tax was payable by the appellants and there appeared to be no material basis for an appeal. The explanation of counsel for the appellants was that, if no appeal had been lodged, they would have been bound as regards future assessments by the findings of the Commissioners in the present case. I am not satisfied that this would be the case ; but as the appeal fails, it is unnecessary to pursue the point.

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The facts of this case differ in one respect from those found in the two cases above referred to.

Two Dutch steamship companies, which are referred to in the case as the Nederland Steamboat Company and the General Shipping Company, were the owners of four steamships known as the Batavier Line and trading regularly between Rotterdam and London. The firm of W. H. Muller & Co. of Rotterdam (referred to as " the Dutch firm ") were the directors of the Nederland Steamboat Company and had the management and control of that company under the supervision of a board, and they were also the shipping agents of the company. The Dutch firm were also the directors of the General Shipping Company, with like powers ; and by a deed dated June 29, 1899, they were appointed exclusive shipping agents for that company and were authorized to appoint sub-agents when they might deem it necessary, subject to the approval of the company. In the year 1904 the Dutch firm appointed the appellants, W. H. Muller & Co. (London), Ld. (referred to as " the London firm ") to be " agents in London for the Batavier Line " ; and since that time the London company have (as the Commissioners found) done everything that was required to be done in connection with the ships of the Batavier Line in London—booking passages, accepting goods and putting them on board, and collecting the freights on

goods shipped c.i.f. In this case, too, the bills of lading were signed for the master by one of the clerks of the London company. The assessments appealed against are for the years ending on April 5, 1916 and 1917.

Upon these facts there can be no doubt that the two Dutch shipping companies carried on business in London; and the only question is whether the London firm were, within the meaning of s. 31, sub-s. 6, of the Finance Act, 1915, authorized persons carrying on the non-residents' regular agency. The contention put forward on behalf of the appellants was that the Dutch company in appointing the appellants agents in London for the Batavier Line made them the agents, not of the Dutch shipping companies, but of the Dutch firm itself, to which alone they were accountable; and that the London firm in conducting the business of the line in London have acted, not for the shipping companies, but for the Dutch firm as their principals, and have never been agents of the shipping companies. I cannot accept this contention. The Dutch firm, by their letter of July 4, 1904, appointed the London company "agents in London for the Batavier Line," signing the letter "W. H. Muller & Company, Batavier Line"; and in the subsequent agreement dated March 6, 1916, the Dutch firm treated themselves as owners of the line and appointed the London firm "sole agents for the Owners in London in respect of the Batavier Line for the transaction of the shipping business of the said Line carried on at Custom House and Wool Quays, Lower Thames Street, in the said City, and in particular for the fixing of rates of freight, the embarkation and disembarkation of passengers, and the carriage of passengers and cargo and other business usually carried on by a line of steamships." I am disposed to think that in signing both these documents the Dutch firm were acting as directors of the shipping companies, and in that capacity appointed the London firm as direct agents of those companies; but even if that be not so, and if the appointments must be held to have been made by the Dutch firm as shipping agents for the Dutch companies and not as directors—still it appears to me that they constituted

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the London firm direct agents of the two companies. In this connection reference may be made to the well known judgment of Thesiger L.J. in *De Bussche* v. *Alt* (1), where he pointed out that in certain cases, where the exigencies of business require it, an agent must be deemed to have authority to constitute a direct privity of contract between a substitute appointed by him and his principals. In my opinion the present case falls within that category, and the appellants were appointed and became the authorized and regular agents of the two Dutch companies in London.

WILLIAM H. MULLER AND COMPANY (LONDON), LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

The appeal in *Muller & Co. (London), Ld.* v. *The Commissioners of Inland Revenue* related to the liability of the appellants for excess profits duty in respect of the profits of the business carried on by the two Dutch companies in London ; and it was admitted that the result of this appeal must follow the result of the appeal in *William H. Muller & Co. (London), Ld.* v. *Lethem.*

For the above reasons I am of opinion that these appeals fail, and should be severally dismissed with costs.

My noble and learned friend Lord Shaw desires me to say that he concurs in this judgment.

VISCOUNT DUNEDIN. My Lords, I deliver this opinion in the cases of *Nielsen, Andersen & Co.* v. *Collins* and *Tarn* v. *Scanlan.* I concur. These two cases, which for practical purposes I consider indistinguishable, are, in my opinion, so far as the first question is concerned—i.e., whether there is a business carried on in the United Kingdom—clearly determined by authority. The case of *Erichsen* v. *Last* (2) is not per se binding on this House, but it is practically so ; for not only was it approved by Lord Herschell in *Grainger's* case (3), but in the subsequent and recent case of *Maclaine & Co.* v. *Eccott* (4) both the Lord Chancellor, in whose judgment Lord Atkinson and Lord

(1) 8 Ch. D. 286, 310.
(2) 8 Q. B. D. 414.
(3) [1896] A. C. 325, 335.
(4) [1926] A. C. 424, 432–3, 438.

Sumner concurred, and Lord Shaw explicitly adopted *Erichsen* v. *Last* (1) as good law. In applying the law of that case to the facts of this, I agree entirely with the Master of the Rolls, who says: "It appears to me that there was a business, the business of securing freights for their ships, which was carried on in this country."

Then the question of whether the tax was rightly levied on the appellants as agents under s. 41 is a pure question of fact. The point urged by the learned counsel was that the contract of carriage was really effected by the bills of lading which were made out by the master and not by the appellants. I quote again from the Master of the Rolls, who, I think, correctly states the result of the evidence. "The appellants in both these cases were acting as agents for the foreign company for the purpose of entering into contracts and securing business for the foreign company, the business of filling their vessels with goods and then securing freight to be paid to the shipping company." That is the substance of the transaction, and I do not think it matters if the bills of lading were actually signed by the master, though as a matter of fact they were signed for the master by a clerk lent by the appellants. For the real contract out of which the profits arise is the contract made by the appellants with the person who sends the goods, and that is made on behalf of the shipping company and not by the appellants as principals. The result is that in so far as they received freights out of which profits are earned, they are accountable during the earlier years; and then so far as the year after the Act of 1915 is concerned they do not escape, because they are the regular agents and therefore fall within the rider on the exception provided by note 6 of s. 31.

With regard to the other two cases I concur in the opinion of the Lord Chancellor.

LORD ATKINSON [read by LORD CARSON, who stated that in the first two cases his noble friend had asked him to say that he agreed with the judgment already delivered by the Lord Chancellor. In the cases of *Muller & Co. (London)*,

(1) 8 Q. B. D. 414.

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Lord Atkinson.

Ld. v. *Lethem* and *Muller & Co. (London), Ld.* v. *Commissioners of Inland Revenue* his opinion was as follows :] My Lords, the facts have been fully stated already. Three companies are involved in this litigation. The first, an English company, incorporated under the Companies Acts, 1862 to 1900, under the name of Wm. H. Muller & Co., Ld., 32 Bury Street, London, E.C. The business of this company is found to be :—

"(A) To carry on the business of merchants, shipowners, shipbrokers, insurance brokers, underwriters, managers of shipping property, freight contractors, carriers by land or sea, forwarding agents, commission agents, colonial and produce brokers, corn factors, ore and metal brokers and dealers, and any other business which usually is or conveniently can be carried on in conjunction with any of these businesses.

"(M) To do all or any of the matters aforesaid, alone or in conjunction with or as agents for foreign firms, companies or persons, and generally for other companies and persons, and to establish, regulate and discontinue agencies for the purposes of the Company."

The second is a Dutch company established in Rotterdam in the year 1896, and, for convenience sake, named the Nederland Steamboat Company. Its business is found to be to run a freight and passenger service between Rotterdam and London with the right to run insurance risk on its own vessels and on goods shipped on those vessels. Art. 10 of its statutes provided for management of the company by a director under the control of its board, which consisted of not less than three or more than nine members. This director is given the management and control of the company, which he represents "in law and outside the law."

The third company is W. H. Muller & Co., for convenience styled the General Shipping Company. It is a Dutch company established and incorporated at Rotterdam in the year 1899 for the following purposes—namely :—

"(A) The carrying on of a shipowner's business ;

"(B) The ownership of shares in companies carrying on shipowners' business ;

"(c) The purchasing, building, launching, equipping, managing, chartering, re-chartering, engaging and selling of sea and river craft;

"(d) Transport of passengers, goods and cattle, the establishment of new, the purchase of existing, and the management of places for the building, docking and repairing of vessels and machinery for the loading and discharging of vessels or for the storage of goods;

"(e) The insurance of all sorts of risks . . . ."

The most intimate relations appear to bind together these three companies. For instance, a preponderating interest in the share capital of the London company was vested in a Mr. Kroller, a Dutchman who was a partner in a registered parnership named W. H. Muller & Co., Rotterdam, having its head office at The Hague, and referred to as the Dutch firm. All the ordinary shares in this Dutch firm were held by this same Mr. Kroller, together with his wife and his brother. But the 6 per cent. preference shares in this firm were held by outsiders.

By the 9th and 10th articles of the General Shipping Company it is provided that the company is to be managed by a director, under the control of their board, which director, it is provided, was to represent the company in law and outside the law. By its 41st article it is provided that the Dutch firm was nominated as the first director of their General Shipping Company, and that the four Dutch gentlemen there mentioned were to be nominated as its board. By a deed dated June 29, 1899, styled a deed of contribution, it is recorded that the Dutch firm had contributed considerable assets mentioned in detail in the deed to the General Shipping Company on the following, amongst other conditions:—

"(1.) That the Dutch Firm should act as exclusive shipping agents and exclusive cargo superintendents of the Company both in Rotterdam and in those places where the Dutch Firm were or might thereafter be established or represented by agents.

"(2.) That the Dutch Firm should, subject to the approval of the Company, appoint sub-agents wherever they might deem this necessary.

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"(3.) That the Dutch Firm should have the right to charge for their services referred to in Article 1 as shipping agents a commission of 4 per cent. on the gross amounts of freights and passages for cargo and passengers dealt with by them—none excepted—and might, moreover, in cases where they acted at the same time as cargo superintendents on behalf of the Company, charge for their services as such a further commission of 1 per cent. besides the usual discharging and unloading charges in accordance with the tariff then in force of the Rotterdam Cargo Superintendents whether they are paid separately by the consignees and the shippers or included, or to be included, in the freights. By Minute of General Meeting dated 29th June 1899, the salary of the Manager was fixed at 3000 florins per annum.

"The Commission payable under this Deed was in addition to the Commission payable to the Dutch Firm as Directors."

The Nederland Steamboat Company, i.e., Company No. 2, owned two vessels, named *Batavier* 2 and *Batavier* 3, and the General Shipping Company owned two vessels, *Batavier No.* 4 and *Batavier No.* 5. During the years to which the assessment of income tax relates these four vessels, and those vessels alone, constituted the Batavier Line. The evidence and the authorities have been fully dealt with both before Rowlatt J. and in the Court of Appeal. It is unnecessary for me to analyse the evidence again or deal with the authorities again. It is sufficient, I think, for me to express the opinion I entertain: that it is absolutely hopeless to contend that these two companies Nos. 2 and 3 did not by means of their four vessels carry on a trade or business in England of the nature found in the case. As neither of these companies was resident in England they must necessarily have carried on this business through a body or a person or persons resident in England acting on their behalf in the conduct of their business as their agent or agents.

These two companies being fully alive to the necessity in this respect which their enterprise imposed upon them, wrote to the English company, i.e., Company No. 1, a letter the details of which make it doubly significant.

"Rotterdam,
4th July 1904.

"Messrs. Wm. H. Muller & Co. (London) Ltd.,
Bury Street, London, E.C.

Dear Sirs,

In respect of your having taken over the business hitherto carried on by the Nederland Steamboat Co., at Custom House and Wool Quays we herewith confirm, that we appoint you Agents in London for our Batavier Line, and as such you will have to follow our instructions in all matters concerning this line, and especially as to the fixing of any rates of freight etc., nor will you fix any rates for wharfage, cartage, rent etc. for goods carried by our Batavier Line without our approval. Your remuneration for the Agency will be as follows :—

"Advertisements 10*s*.
Reporting inward and clearing outward 1*l*. 1*s*. 0*d*.
Customs Manifest 10*s*. 6*d*.
B/L Postage 2*s*. 6*d*.
Telegram and Petties 12*s*.
Stevedores' Charges 1*s*. per ton in and outward.
Quay Charges 10*l*. per steamer.
Embarking and disembarking over the wharf passengers 4*d*. each.
Bicycles if passenger's luggage 6*d*. each.

"Moreover we shall have to refund to you the following paid out charges :—
Tonnage Dues.
River Pilotage.
Mooring and Unmooring.
Shifting.
Waterman's Attendance.
Customs Overtime.
Landing Customs Officers at Gravesend.
Pilot Calling.
Noting Protest.
Water Supplied.

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Please let us have acknowledgment of the present and believe us,

"Yours truly,
W. H. MULLER & CO.
"(Batavier Lijn)."

On July 6, 1904, the London company acknowledged the receipt of this letter as requested, and on July 7 next day the Dutch firm wrote to W. Muller & Co. (of London), Ld., a letter, which runs as follows :—

"In reply to your favour of yesterday we beg to inform you that we can only allow you as agents 4*d*. per passenger in and outward when passing over the wharf. That is what we understand from Mr. Kroller what he allowed to the wharf under this heading.

"We agree with 2½ per cent. commission on freight and passengers inwards and 5 per cent. commission on freight and passengers outwards.

HALF LIGHTERAGE ON HORSES OUTWARDS FROM LONDON.

"The undersigned talked this matter over with Mr. Chambers and it was fully agreed that the Lighterage of horses shall be taken as included in the wharfage this lightering being an extension of the Wharf. This is necessary by the Conference under which we are compelled to charge per horse 20*s*. sea freight and 3*s*. 6*d*. wharfage, and if we do anything not included herein we have to charge this separately to the customers. In this case the charge for lighterage would be prohibitive for the knacker trade.

"Yours faithfully,
WM. H. MULLER & CO. (Batavier Lijn),
(Signed) N. Van de Roemer."

It is plain upon the face of this letter that the Dutch firm treated the London company as the agents of the Batavier Line to manage its London business. There is nothing about a sub-agency.

It is found at p. 7 of the case stated that—

"10.—The London company are the lessees of the Custom House and Wool Quays Wharf in London to and from which

the four above mentioned vessels of the Nederland Steamboat Company and the General Shipping Company regularly sail. The name 'Batavier Line' is exhibited outside the office of the London company, their telegraphic address is 'Batavier, Bilgate, London,' and the London Postal Directory contains an entry 'Batavier Line, W. H. Muller & Co. Ltd. Office, London Wharf, Wool Quay.' Advertisements of the service carried on by the Batavier Line are inserted in the Press and paid for by the London company, the charges being refunded by the Dutch firm."

On the next page (p. 8) the methods followed in the conduct of their business connected with the vessels constituting the Batavier Line are described in great detail, and at p. 9 it is found that the London company did everything that was required to be done in connection with the ships in London obtaining instruction when necessary from the Dutch firm. The London company had no direct communication with either the Nederland Steamboat Company or the General Shipping Company except through the Dutch firm.

It is easy to dub an agent with the name of a sub-agent, but the real position, power and authority of the man thus dealt with must be determined by his action: What authority he, with the approval of his principal, exercised; what he did; what was the nature and reach of his work. The London company were appointed by the Batavier Line to be its agent, and not merely to act as its agent to transact in England the business of the line which required to be there transacted. The idea that the Dutch firm which did not reside in England should be held to be the agent to transact in England the English business of its non-resident principal, the Batavier Line, is a rather absurd idea it would appear to me, and is altogether inconsistent with the terms of the letter appointing the London company as agents, and the evidence in the case. I think therefore that the London company is liable to be assessed for the income tax sought to be recovered as the agent of the Batavier Line who transacted their business in England, and that the appeal fails, and should be dismissed.

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LORD CARSON. My Lords, I agree with the judgment delivered by the Lord Chancellor, and I only desire to say in the cases of *Muller & Co. (London), Ld.* v. *Lethem* and *Muller & Co. (London), Ld.* v. *Commissioners of Inland Revenue* I felt some difficulty during the argument as to whether the appellants were the "agents" of the General Shipping Company within s. 41 of the Income Tax Act, 1842, or s. 45 of the Finance (No. 2) Act, 1915. It is very necessary where personal liability to taxation is imposed upon an agent in respect of business carried on for his principal not to extend such liability beyond the exact terms of the Act of Parliament, and I was impressed by the argument that there was no privity of contract between the appellants and the General Shipping Company. Upon consideration, however, I am of opinion that the question of whether the tax was rightly levied upon the appellants as "agents" under s. 41 is one of fact. In the present case, under the agreement of June 29, 1899, authority is reserved to the Dutch firm "subject to the approval of the company" (i.e., the General Shipping Company) "to appoint sub-agents whenever they might deem this necessary," and I think the Commissioners were justified in finding that the appointment of the appellants carried with it the knowledge and approval of the company. There is, therefore, evidence to support the finding of the Commissioners that the General Shipping Company carried on a trade in the United Kingdom with the appellants as their agents or managers.

In each case :—

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, Nov. 7, 1927.

In *Tarn* v. *Scanlan* and *Nielsen, Andersen & Co.* v. *Collins.*

Solicitors for the appellants : *Nicholson, Graham & Jones.*

Solicitor for the respondents : *Solicitor of Inland Revenue.*

In *Wm. H. Muller & Co. (London), Ld.* v. *Lethem ; Same* v. *Inland Revenue Commissioners.*

Solicitor for the appellants : *C. J. Sharpe.*

Solicitor for the respondents : *Solicitor of Inland Revenue.*

Applied. WORKINGTON HARBOUR AND DOCK BOARD *v.* OWNERS OF THE S.S. TOWERFIELD. [1950] 2 All E.R. 414.

Applied. WORKINGTON, ETC., BD. *v.* TOWERFIELD [1951] A. C. 112

[HOUSE OF LORDS.]

GREAT WESTERN RAILWAY COMPANY . . . . . APPELLANTS;

AND

OWNERS OF S.S. MOSTYN . . . . RESPONDENTS.

H. L. (E.)*
1927
Dec. 19.

THE MOSTYN.

Shipping—Docks—Damage by Vessel to Dock Works—Liability for Damage caused without Negligence—Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 74.

Under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, the owner of a vessel doing damage to a harbour, dock or pier, or works connected therewith, is responsible to the undertakers for the damage, whether occasioned by negligence or not, where the vessel is at the time of the damage under the control of the owner or his agents.

So *held* by Viscount Haldane, Lord Shaw of Dunfermline, and Lord Blanesburgh; Viscount Dunedin and Lord Phillimore dissenting.

River Wear Commissioners v. *Adamson* (1877) 2 App. Cas. 743 explained and distinguished.

Decision of the Court of Appeal [1927] P. 25 reversed.

APPEAL from an order of the Court of Appeal (1) affirming a decree of Lord Merrivale P. (2)

The appellants, who were the owners of the docks at Swansea, brought this action against the respondents, the owners of the steamship *Mostyn*, to recover an agreed sum of 226*l.* 4*s.* 6*d.* by way of damages for negligence, or alternatively as the amount for which the respondents were liable under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, for the damage done by the *Mostyn* to the Swansea docks or the works connected therewith. In a masonry chaseway at the bottom of a communication passage leading from King's Dock to the Prince of Wales' Dock electric cables were laid for lighting purposes and the supply of power. On the night of October 26, 1923, while the *Mostyn* was proceeding along this communication channel to the Prince of Wales' Dock, her port anchor fouled and damaged some of these

* *Present:* VISCOUNT HALDANE, VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, and LORD BLANESBURGH.

(1) [1927] P. 25. (2) [1926] P. 46.

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cables, with the result that the docks were plunged in darkness. The cables were part of the dock works. The President came to the conclusion on the evidence that no negligence was proved against the respondents, and held, on the authority of the decision of the House of Lords in *River Wear Commissioners* v. *Adamson* (1), that, where negligence was disproved, liability under s. 74 of the Act of 1847 did not lie upon an owner whose vessel had damaged a dock or works in connection therewith. He therefore gave judgment for the respondents.

The Court of Appeal (Bankes, Atkin and Sargant L.JJ.) affirmed the judgment of the President.

On the appeal to this House, after the question of negligence had been fully argued, their Lordships decided to hear the rest of the appeal. The facts on the issue of negligence are fully stated in the judgment of Lord Phillimore.

1927. Nov. 14, 15, 17, 18. *Raeburn K.C.* and *Wilfrid Lewis* for the appellants. The language of s. 74 of the Harbours, Docks, and Piers Clauses Act, 1847, looked at apart from authority, is free from ambiguity. The effect of the section is to render a shipowner liable to the dock authority for any damage done by the ship to a dock, or works connected therewith, whether negligence is proved or not. The section was inserted for the protection of dock authorities and is really an insurance section. This was the view taken by the Court of Queen's Bench in *Dennis* v. *Tovell* (2), which was followed by Sir Robert Phillimore in *The Merle*. (3) In *River Wear Commissioners* v. *Adamson* (4), however, some limitation was put upon the generality of the terms of the section by the decision of the majority of their Lordships in this House ; but rightly understood that decision does not cover the present case. In that case the ship was driven on shore by a storm in endeavouring to make the port of Sunderland, the crew

(1) 2 App. Cas. 743.
(2) (1872) L. R. 8 Q. B. 10 ; 27 L. T. 482.
(3) (1874) 2 Asp. M. L. C. 402.
(4) (1876–7) 1 Q. B. D. 546 ; 2 App. Cas. 743.

were rescued, and the ship, being a complete wreck, was driven by the force of the wind on to the pier and damaged it. An action under s. 74 of the Act of 1847 by the harbour authority against the shipowner to recover the damage resulted in a verdict for the plaintiffs, but the Court of Appeal held that the defendant was not liable. It was felt that the application of the section to the very special facts of that case would inflict a serious hardship on the shipowner, but the difficulty was how to get over the language of the legislature. Jessel M.R. based his judgment on the view that the section must be read as subject to an implied exception where the damage was caused by the act of God. Kelly C.B. proceeds on the same view and also on the fact that the ship was derelict. Mellish L.J. takes substantially the same view and regards the statute as limited to the case where the damage is caused directly or indirectly through the act of man. Denman J. also proceeds on the act of God. Pollock B. concurred on the ground that the vessel was extraneous to the dock. In the House of Lords, where the decision of the Court of Appeal was affirmed by a majority, Lord Gordon dissenting Lord Cairns rejects the act of God theory. He regards the section as a procedure section and reads "damage" as meaning actionable damage, i.e. damage occasioned by negligence or wilful misconduct. He says that no new right was created by the section, but his own judgment shows that a new right was given, and he misapprehends s. 76, the section which gives a right over to the shipowner. If that were the only judgment it must be conceded that it is opposed to the appellants' contention. But Lord Cairns's reasoning did not prevail. It derives no support from Lord Hatherley, who apparently adopted Mellish L.J.'s reasons, nor from Lord O'Hagan, who limits his judgment to the very peculiar facts of the case. Lord Blackburn's judgment is self contradictory and appears to be based upon a misapprehension of Mellish L.J.'s reasoning, which he professes to adopt. The balance of opinion in the House of Lords is that where the ship is or should be still under control, proof of negligence is not necessary to establish

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liability under this section. Mellish L.J. put the appellants' argument, when he said it was clearly the intention of the legislature to extend the liability of shipowners in favour of dockowners beyond the liability imposed upon them by common law, because if that was not the intention it was difficult to see what was the object of the section.

[They also referred to *Arrow Shipping Co.* v. *Tyne Improvement Commissioners. The Crystal* (1); *Smith & Sons* v. *Wilson* (2); *Postmaster-General* v. *Beck and Pollitzer* (3); Beven on Negligence, 3rd ed., p. 319; Clerk and Lindsell on Torts, 7th ed., p. 450; Lord Halsbury's Laws of England, vol. xxvi., p. 644, note (*a*); *British American Tobacco Co.* v. *Jones* (4); *Det Forenede Dampskibs Selskab* v. *Barry Ry. Co.* (5)]

Langton K.C. and *K. S. Carpmael* for the respondents. It is admitted that the House of Lords put some restriction on the section and it is now suggested that the vessel in *Adamson's* case (6) did not have an owner; but the vessel was not abandoned; a derelict does not cease to be the vessel of the owner. In the respondents' submission Lord Cairns' reasoning was supported by Lord Hatherley and by Lord Blackburn, but, whether that is so or not, the restriction suggested by Lord Cairns was the right one. Assuming that some limitation must be put upon the language of the section, Lord Cairns' construction is the only construction which avoids the necessity of reading new words into the section. He says, as mere matter of construction, "damage" must be construed as meaning actionable damage: injuria cum damno. The respondents rely upon the judgments of Lord Merrivale and Sargant L.J. as expressing their contentions.

[They referred to the Merchant Shipping (Liability of Shipowners and Others) Act, 1900, and *The Ruapehu.* (7)]

Raeburn K.C. replied.

The House took time for consideration.

(1) [1894] A. C. 508, 519.
(2) (1896) 8 Asp. M. L. C. 197.
(3) [1924] 2 K. B. 308, 312, 314.
(4) (1925) 42 Times L. R. 236.
(5) (1919) 1 Ll. L. Rep. 658.
(6) 2 App. Cas. 743.
(7) [1927] A. C. 523.

1927. Dec. 19. VISCOUNT HALDANE. My Lords, this was an action brought by the appellants against the respondents for damages for the negligence of the latter in so manœuvring the steamship *Mostyn* that in navigating a concrete laid channel of communication between the King's Dock at Swansea belonging to the appellants, and the Prince of Wales' Dock, also belonging to them, in common with the channel of communication, the *Mostyn* tore up and injured, to the extent of 226*l.* 4*s.* 6*d.*, certain electric cables which crossed the bottom of the concrete laid channel in a horizontal chase-way, open at the top. The claim is based on an allegation of negligence, resulting in liability at common law, and also on the provisions of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, which it is said does not require proof of negligence in order to render it applicable. The Courts below have agreed in holding that negligence has not been proved, and the nautical assessors who have been present to advise us are of opinion that there was no negligence shown. I understand that we are unanimously of the same opinion, and I shall leave it to others of your Lordships to state the facts out of which this opinion has arisen. I wish, however, to guard myself from being supposed to concur unreservedly in the whole of the observations made by the President, Lord Merrivale, who tried the case, and also in all of the reasons given in the Court of Appeal, which affirmed his conclusion. In a case of this kind, tried after a prolonged interval and dealing with circumstances which have been difficult for the witnesses to observe accurately, it generally results that details of what has been said by witnesses are open to criticism. There has been a good deal of such criticism in the course of the argument for the appellants, and some of it was not without foundation. But reading the evidence as a whole, I have come to the clear conclusion that negligent navigation has not been established. In cases like this, judges and counsel alike are apt to fasten on details, rather than on the whole to which they belong. The details are sometimes of a kind on which it is not possible to form a reliable judgment. If they are not individually

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vital, the true method seems to me to be to study the evidence as a whole, and to recognize that its individual details cannot be exhaustively estimated. Reading the whole of the evidence in this macroscopic fashion is safer than the mere piecing together of microscopic estimates of particular incidents, which are misleading apart from their context. The distinction between the two methods is to-day familiar in scientific investigation, which recognizes that the macroscopic procedure is the only one which can afford a picture that is at all adequate of what has been experienced.

With this observation, I pass to the very serious question of law which is raised by the second branch of the appellants' argument, on the assumption that actual negligence has not been proved.

My Lords, s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, provides that "the owner of every vessel or float of timber shall be answerable to the undertakers" (the persons authorized to construct the dock) "for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and put his vessel in charge of."

By s. 76 a remedy over is given to the owner who has had to make satisfaction for any such damage wilfully or negligently done by the master or person in charge, or, if the owner has had to pay any penalty or costs, by reason of any act or omission of any other person, the person who actually

did such damage or committed the offence is to indemnify the owner.

The question which we have to answer is whether, in a case in which neither negligence nor any other act of an unlawful nature has been established against the owners of the *Mostyn* or those in charge of her, s. 74 makes the owners answerable for the damage done in this case to the dock.

I assume that the master and those in charge were not answerable for any wilful act or negligence, inasmuch as none has been proved against them. But in the case of the owner the section does not in terms require any wrongful act to be established as the condition of liability. The words, taken by themselves, are unambiguous. The owner is to be liable for any damage done to the undertaking. My Lords, if the language of this section could legitimately be construed by us who sit here without regard to authority, I should find difficulty in saying that the appellants were not entitled to claim that it applied. It has been said that to take this view is to attribute to Parliament an intention which is hardly conceivable, the intention of making people liable for damage where they have been in no way to blame. But I am unable to attach much weight to this consideration, where the words are clear. What the motives of Parliament were we do not know and cannot inquire. It may be that it desired to encourage undertakers of this class by providing insurance at the cost of owners who are in no way to blame. There are instances of such a principle in modern statutes, such as the Workmen's Compensation Acts, and it may be that it was something analogous that was in the mind of the legislature. I do not know, and I feel myself precluded from even trying to inquire, or from speculating.

But we cannot proceed here on this simple view. It has been established by a decision which is binding on us by this House that the language must be interpreted as subject to some qualification which is implicit in the words, and the question which alone we are free and bound to examine, is what this qualification is, and how far it extends. In the

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case of *River Wear Commissioners* v. *Adamson* (1) the question related to a vessel which had been driven on shore by a storm in endeavouring to make the port of Sunderland. The crew had been taken off with difficulty, and there was no control of the ship. Being a complete wreck she was driven by the winds and the waves against a pier belonging to the harbour, and damaged it. An action was brought by the Commissioners against the owners, and damages had been awarded at the trial against them. It was held by the Court of Appeal that the action would not lie. Jessel M.R. was of opinion that the general words of the section did not cover a case where the event causing damage occurred by the act of God or the Sovereign's enemies. It would have been equally difficult to hold that there was liability if the damage had been caused by the action of the undertakers themselves. The proviso exempting the owner of the vessel where there was compulsory pilotage showed that the words were not to be interpreted without restriction. As the result he held that the words were to be construed by the analogy of the common law principle that where a duty is imposed by a merely generally expressed rule, that rule is not to be interpreted as covering such causes as the act of God.

Kelly C.B. thought that the rule of construction was that no one can be made liable, excepting by express contract, for injury occasioned by the act of God, and that this rule applied to the general words of the Act of Parliament before them. But he went further on this language itself, for the section went on to refer to the master, a person having the charge of such vessel "afloat," and says that if he was negligent he should "also" be liable. This, and the exemption in case of compulsory pilotage, seemed to Kelly C.B. to show that the word "also" imported only the superadding to the negligent act of the person in actual charge a liability of the same kind imposed on the owner.

Mellish L.J. agreed. He considered that the statute did mean to extend the liability of the owner beyond that at common law, because apart from such an intention it was

(1) 1 Q. B. D. 546; 2 App. Cas. 743.

difficult to see the object of the section. But he held that it contemplated only a case where the running against the pier was caused "through the act of man," and, reading the language as a whole, it looked as though the legislature considered that somehow or other, through the act of man, damage might be done to the pier, and then, in order to get the owner of the pier out of the difficulty of having to prove that it was owing to some particular person's negligence, and that that person was the servant of the owner, it was said the owner is to be liable. The Court was therefore justified in construing the general words, in accordance with the general rule of construction, excluding the act of God.

Denman J. agreed that the section exempted the act of God. The words were strong, but they did not, in his view, include a case where the liability was not caused by the owner or his servants, but by the act of God. The words imposing liability on the person in charge confirmed this view, although there might be cases coming within them where the owner would be liable when no person was in charge but some one ought to have been. But here the act of God was the sole cause.

Pollock B. concurred, though he said that his reasons were not the same as those of the other members of the Court. He did not know whether damage done by a float of timber arising from a cause not provided against by human providence would in itself be enough for exemption. He was not sure that this could be said to be the act of God. But here the vessel was extraneous to the dock authority, and had become derelict. It was only by the force of the elements that she was driven against the pier, and that was not an event against which the statute provided.

My Lords, on these somewhat varying grounds the Court of Appeal reversed the judgment and decided against the Commissioners. It is important to know what was really laid down in this judgment, which was affirmed by the House of Lords. I think only that there having been no human agency as the cause, and the real cause having been the act of God, the case was not covered by the section. The learned

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judges were at least agreed on this, that when the cause was not human agency but a vis major beyond human control, it did not come within the words.

In the case before us there was not only no negligence, but, on the hypothesis which I am making, there was no breach of duty at all. It is therefore important to see whether the grounds of the decision in this House in the *Adamson* case (1) laid down for us any different principle which was held to take the case outside of the words of the statute. This is not easy to determine, for there was divergence of opinion.

Taking first Lord Cairns's view (2), I think that he held that it was to go too far to follow the Court of Appeal in saying that, even where a vis major had been the operative cause, the case was one which would have been outside the language used in the section. He found it, however, " difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts, the legislature, although it might well provide a ready and simple procedure for recovering damages where a right to damages existed by common law, could intend to create a new right and a new liability to damages unknown to the common law." By common law the owner was not liable merely because he was the owner, unless it were shown that those navigating the ship were his servants. All the section does, according to Lord Cairns, is to take the owner and declare him to be the person who may be sued for the damage done. Under the subsequent words he may recover over against the master or crew for any act of omission. The clause was therefore in substance a clause of procedure only, dealing with the mode in which a right of action already existing is to be asserted, and does not create any new right of action for damages. Although he did not concur in the reasoning of the judges of the Court of Appeal, he therefore thought that their conclusion was right, and that the appeal should be dismissed.

My Lords, the massive legal intelligence even of Lord Cairns does not seem to me to have wholly disposed of the

(1) 2 App. Cas. 743. (2) 2 App. Cas. 751.

question before us. He was dealing with a case in which human agency had been superseded. Here we are dealing with one in which there was human agency, although there was no breach of duty. I think that he meant to go further, and to suggest that even if there was human agency there would be no liability created provided that there was no breach of duty at common law. But that question was not before him, and what he suggests was not necessary for the decision of the *Adamson* case. (1) It is therefore important to see whether his suggestion was concurred in by the other noble and learned Lords who took part in the decision. The very power of rhetoric which Lord Cairns commanded when stating his conclusions about matters of legal principle makes it the more desirable to see that we are following the substance rather than the form of his propositions. Even if we accept his view that the section is one creating a new procedure, that of suing the owner while giving him a right to recover over, I am quite unable to see how this leaves the existing substantive law intact and relates to procedure alone. The owner could not be sued under that law unless he had violated some duty. If he can be sued at all, even with a right to recover over, it must be because some new substantive liability has been imposed on him by the statute. I think, therefore, that it follows that the common law has been altered, and that a new right of action has been created depending on the alteration. This is much more than mere procedure. Did his colleagues who heard the appeal with him accept his view as I interpret it ? I think they did not.

I have studied their opinions. Lord Hatherley and Lord Gordon seem to me to have been impressed, as I own that I myself have been impressed, by the difficulty of reading the words of the Act as not altering the common law by including at least the case of an owner who personally or through his servants was navigating the ship when the damage was caused. Lord Hatherley was a very careful judge. I think that his disposition here was to hold that the words of the Act were so free from ambiguity that they covered cases in

(1) 2 App. Cas. 743.

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which there was no human agency, though he did not say so in terms. He was content to express his general agreement with the view of Mellish L.J. that the statute only applied where human agency had intervened, and that it was because it was absent in the *Adamson* case (1), that he concurred in the judgment of the Court of Appeal. I doubt whether Lord Hatherley himself was ready to accept even this restriction of its scope, but he thought it at least a possible one, and if true it was enough to take the circumstances in the case before him, where there was no human agency, outside the language of the Act. That Lord Hatherley did not in terms dissent from the general result reached by the majority I cannot regard as an important circumstance in ascertaining his opinion. Lord Gordon expressly dissented. At the conclusion of an elaborate judgment he expressed the opinion that the statute ought not to be construed as if it contained any exemption from liability where it occurred even from the act of God. The words appeared to him to be express and unambiguous, and being so, he thought that they ought to be read according to their ordinary construction.

My Lords, there remain to be considered the opinions of Lord O'Hagan and Lord Blackburn, with a view to ascertaining whether these noble and learned Lords concurred in the view which had been expressed by Cairns L.C., that no new right of action at all was created, whether or not human agency was present.

My Lords, upon scrutiny of the words used by Lord O'Hagan, I have come to the clear conclusion that he did not concur in the dictum of the Lord Chancellor, so far as it went beyond the facts of the case before him, that the statute created no new right of action, but was confined in its scope to procedure only. The language, Lord O'Hagan thought, was prima facie sufficient to cover all cases, including those in which no human agency came in. But he was of opinion that, reading the whole of the section, and particularly the reference to " such " vessel in the words declaring the liability of the master or person having charge of it, an intention was expressed

(1) 2 App. Cas. 743.

to confine the liability of the owner to vessels "in charge of a master or somebody else." On this point he expressed his concurrence with Mellish L.J. The owner is therefore placed in a worse position than he would have been at common law, but not so bad as that in which he would have been had he been made liable when no one had charge on his behalf. The proviso as to the compulsory pilot seemed to Lord O'Hagan to confirm this conclusion. In his view the statute did, as Lord Cairns had said, simply introduce new procedure to the advantage of the dockowner, but it did not enlarge the liability beyond the limits he had indicated. On the question whether the act of God was excepted it was therefore unnecessary for himself to express an opinion, for it did not arise. In *Dennis* v. *Tovell* (1) the vessel was perhaps not derelict and the owner might properly be held liable.

In Lord Blackburn's opinion a statute was an instrument in writing, to be construed on the same principles as other such instruments. He thought that, on every construction of the statute which he had heard suggested, the legislature had intended to impose on the owner of the ship a liability occasioned by persons for whom he would not have been liable at common law. But he did not think that the legislature could have meant to shift the burden of a misfortune befalling the owner of the pier from its owner, who at common law would bear it, to the owner of a ship wholly free from blame and involved, without fault of his, in a common misfortune. Lord Blackburn (2) was of opinion that the purpose of the legislature was to give the owners of the pier more protection than they had. With a view to this it had enacted the remedy was to be that the owner, who was generally really liable (for the acts of his agents) though it might be difficult and expensive to prove it, should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proof how the mischief happened, and that this is expressed by saying that the owner shall be "answerable for any damage done by the vessel or by any person employed about the same" to

(1) L. R. 8 Q. B. 10. (2) 2 App. Cas. 768-9.

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the harbour. "As to the cases in which the fault was that of some person not able to make compensation, for whom the shipowner was not at common law responsible, it may have been thought that the cases would occur so seldom, or when they occurred would probably be of such small amount, that the shifting of the loss from the owner of the property to the owner of the ship was not too high a price to pay for the saving of litigation and expense. The cases of a common misfortune befalling both ship and pier, without fault of either, seem not to have been thought of. At all events, no exemption or proviso to take these cases out of the general enactment is given in express words." He comes to the conclusion that this was the scheme of the legislature; the mischief being the expense of litigation, the remedy that the shipowner should be liable without proof of how the accident occurred. He dissented from his own judgment in *Dennis* v. *Tovell* (1), but with great doubt and hesitation. He expressed himself as adverse to the view taken in the Court below that where a statute is made which might have expressed but has not expressed, an exception of the act of God, the Courts should introduce it. He observed that Mellish L.J. and Lord Cairns had thought that the words might be construed so as to make the owner of the ship answerable only for damages occasioned by the act of man; damages for which some one is answerable at common law. But he could not see anything in the words to justify what was the opinion of some of the judges in the Court of Appeal and, he thought, of Lord O'Hagan, that the language was confined to cases in which some one was in actual charge of the ship. Even if it were so this would not, in his view, help the owner in the case before him, for he was in possession of the ship until it was driven on the bank, after which the tide floated it in. The owner was still owner when this ship struck the pier, and it was no mere "congeries of planks," nor was it, in his opinion, a derelict. He had great doubt and hesitation in affirming the judgment of the Court of Appeal, but he would not dissent from the proposal to do so. It was conceivable,

(1) L. R. 8 Q. B. 10.

as Mellish L.J. had thought, that the words referring to "damage done by the ship" might have the restricted sense of injuria cum damno.

My Lords, when the expressions used by Lord Blackburn are considered, I cannot find in them concurrence with the dictum of Lord Cairns that no new right of action was created, even where human agency came in, and that the wide words at the beginning of the section were intended to introduce nothing more than what Lord Cairns had spoken of as a new form of procedure, which would indeed assist the dockowner to pursue a new kind of remedy, but conferred on him no fresh substantive right. On this point the opinions delivered appear to me to leave us under the duty of deciding, unfettered by authority, whether when the vessel which caused the damage was under the control of the owner's agents, he is liable notwithstanding that there was no breach of the duty not to be negligent on their and his part. I do not think that *River Wear Commissioners* v. *Adamson* (1) settles the point of non-liability where the vessel was in charge, at the time of the accident, of the owners' agents. It seems to me that the words of the statute are too clear to admit of this conclusion, and that the decision of this House in the earlier case is not in truth any authority for it. We do not know enough of the facts in *Dennis* v. *Tovell* (2) to enable us to say whether that case was one of a derelict or whether any one remained in charge of the vessel. If there was no human agency then what I have said does not apply in that case. I comment on the decision in *Adamson's* case (1) on the assumption that, notwithstanding what was said by Lord Blackburn, there was no such human agency. For if there was, that in my view brings the case within the uncontrolled words, and would render it analogous to the present case. But on the facts set out in the report I think that the vessel must be taken to have become out of human control.

We appear to me to be bound by the authority of the *Adamson* case to hold that the section in question is not to be read literally, but as applying when the damage

(1) 2 App. Cas. 743. (2) L. R. 8 Q. B. 10.

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complained of has been brought about by a vessel under the direction of the owner or his agents, whether negligent or not. The decision further exempts the owner when the vessel is not under such control but is for instance derelict. When there are facts to which it applies it effects an alteration in the common law which imposes a new liability to be sued on the owner, and to that extent changes not merely procedure but also substantive law.

My Lords, if these things are true I think that on the facts established in the present case we must find the owners liable, reverse the judgment of the Court below in their favour, and give judgment for the appellant railway company for damages, the agreed amount of which is 226*l.* 4*s.* 6*d.*

The appellants are entitled to the general costs here and below, excepting the costs on the issue of negligence, on which they have failed. These costs they must pay to the respondents.

VISCOUNT DUNEDIN. My Lords, I have had the advantage of reading Lord Phillimore's judgment. He has dealt exhaustively with the question whether there was negligence on the part of those in command of the *Mostyn*, and has come to the conclusion there was none. I agree with his statement and his reasons. I wish, however, to add one remark, because I think the opinions of the learned judges of the Court of Appeal, who also found there was no negligence, might be misinterpreted.

There are passages in those judgments which would seem to favour the view that, though the captain knew it would be a negligent thing to do to enter the passageway with the anchor down, yet, inasmuch as his command to heave up the anchor was given at a time which would ordinarily have sufficed to take it off the ground before the passageway was reached and he was only thwarted by the unexpected and unsuspected interference by the Post Office cable, he is thereby excused. That is not my view. If he had been unhampered in his movements, knew that he had an anchor down and knew that it would be wrong to enter the passage with it

down, I think it would be for him to see that he got it up before he entered the passage and that he could not excuse himself by saying: "I began to heave at such a time as would ordinarily have sufficed." But on the facts here he was not unhampered. His anchor was down without negligence. He was compelled to move on because of the position of the ship and the gale, and, therefore, the position of affairs, as I have just put it, did not arise.

I now come to the point on the statute. The opinions of the noble Lords who decided *River Wear Commissioners* v. *Adamson* (1) have been analysed again and again. I do not propose to do so, because I do not think I could add anything helpful to what has been said by Herschell L.C. in the case of *The Crystal* (2), and by the learned judges of the Court of Appeal in this case. At the same time, I do not agree with the method of treatment which those learned judges took in dealing with *Wear* v. *Adamson*. (1) I think it quite necessary to say this because there is, in truth, no difference in the position of the Court of Appeal in this matter and that of your Lordships in this House. *Wear* v. *Adamson* (1) is binding equally on both tribunals. Now, when any tribunal is bound by the judgment of another Court, either superior or co-ordinate, it is, of course, bound by the judgment itself. And if from the opinions delivered it is clear—as is the case in most instances—what the ratio decidendi was which led to the judgment, then that ratio decidendi is also binding. But if it is not clear, then I do not think it is part of the tribunal's duty to spell out with great difficulty a ratio decidendi in order to be bound by it. That is what the Court of Appeal has done here. With great hesitation they have added the opinion of Lord Hatherley to that of Lord Cairns and then, with still greater difficulty, that of Lord Blackburn, and so have secured what they think was a majority in favour of Lord Cairns's very clear view. I do not think that the respect which they hold and have expressed for the judgments of your Lordships' House compelled them to go through

(1) 2 App. Cas. 743. (2) [1894] A. C. 508.

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this difficult and most unsatisfactory performance. As I have said, our own position is just the same as theirs, and I say unhesitatingly that I agree with Lord Herschell that you cannot extract from the judgments in *Wear* v. *Adamson* (1) such a ratio decidendi as is binding. That, however, is far from wiping *Wear* v. *Adamson* off the slate. It remains for two purposes. First, for the judgment itself and, second, for the opinions of the noble Lords, which are entitled to the greatest respect. Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it was applied to the facts of *Wear* v. *Adamson* (1), lead to a different result. In other words, Lord Gordon's view is not open to us. Then, Lord Gordon's view being gone, there are, in my opinion, just three different rationes decidendi on which the result can rest.

There is, first, Sir George Jessel's view—namely, that the words of s. 74, absolute in their terms, must be held as having added to them an exception in the case of an act of God, or, in other words, that the exception of an act of God to a duty or liability cast on a person by the common law is equally true of a duty or liability cast on him by an Act of Parliament. My Lords, I think that that view was in terms disapproved by their Lordships in this House, and I entirely agree with them.

My Lords, I had prepared my opinion so far, but I am bound to add a word or two in view of what is going to be said by my noble friend Lord Blanesburgh. He has taken the view which, although the case of *Wear* v. *Adamson* (1) has been again and again considered, I do not think has before been taken, that Sir George Jessel's opinion rests particularly on the pilotage exception. I am not at one with my noble and learned friend about that. I think Sir George Jessel's view was this: No doubt he took the pilotage exception, but he took it in this way. He said: "Here you must

(1) 2 App. Cas. 743.

revert to the general doctrine of law that there is an exception to a duty at common law of the act of God, and if you do that you find the pilotage exception exactly fits." But I do not think it matters whether I am right about that or not, because whatever Sir George Jessel said there is no question that Kelly C.B. and Denman J. put the matter quite clearly that there was the same exception to an Act of Parliament as there is to a duty cast by common law, and that view was undoubtedly disapproved by this House. Lord Cairns (1), first of all, deals with it, and after taking the other view of what Sir George Jessel had said and then adding the Chief Baron and Denman J., he says: "In my opinion, these expressions are broader than is warranted by any authorities of which I am aware. If a duty is cast upon an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. It is a duty of a carrier to deliver safely the goods entrusted to his care; but if in carrying them with proper care they are destroyed by lightning or swept away by a flood, he is excused, because the safe delivery has by the act of God become impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damage occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man or by the act of God." Lord Blackburn is just as explicit (2), where he says, speaking of the old case of *Paradine* v. *Jane* (3): "the really important part of the decision is that where a contract is made which does not either expressly or impliedly except the act of God, the Courts could not introduce that exception by intendment of law; and that makes strongly against the supposition that, in construing a statute where the legislature might

(1) 2 App. Cas. 750. (2) 2 App. Cas. 771.
(3) (1647) Alleyn, 26.

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have expressed, but did not express, such an exception, the Court should introduce it." My Lords, with those opinions I humbly concur, and I have made this digression because I think it would be very unfortunate that there should be any doubt left that that doctrine has been contemned by the House. My noble friend also says that he would have been content to decide the case upon *Fletcher* v. *Rylands* (1) and *Nichols* v. *Marsland.* (2) With great deference to him, I think that analogy is quite a false one.

This leaves the other two views. (1.) The view of Lord Cairns that damage in the section must be read as confined to actionable damage, and (2.) the view suggested by Mellish L.J. and favoured by some of the noble Lords that the action which led to the damage must be action attributable to human agency but, that being found, that the words of the section remain absolute. It becomes necessary —for I can see no other alternative—to choose between these two views.

My Lords, on very anxious consideration of what is obviously a difficult and obscure question, I have come to be of opinion that the view of Lord Cairns is the preferable view. I am moved by two considerations. First, I think it is easier to interpret a word used, i.e., damage, in a certain sense rather than to read into the section words which are not there, but which are to be gathered from a general view of the section as a whole. Second, I think that the compulsory pilot exception fits Lord Cairns's view better than it fits the other. It is obvious that the reflected light which this clause gives as to interpretation of the preceding part in an Act of 1847 cannot be affected by a change of the law in the Act of 1913. Now, the position of the clause to Lord Cairns's view may be found in his own words (3): "This makes the part of the section relating to the employment of a pilot intelligible and consistent with the rest of the enactment. If a licensed pilot is in charge, the owner is not discharged from a possible liability, but everything is left as

(1) (1866) L. R. 1 Ex. 265; (1868) L. R. 3 H. L. 263

(2) (1876) 2 Ex. D. 1.

(3) 2 App. Cas. 752.

it would be at common law. If a pilot was in charge of the ship and the owner was at the same time the master navigating the ship, and did an act which caused damage, he would be liable at common law, and the Act leaves him so; but, in the same case, if, while the pilot was in charge and the owner was navigating the ship, the ship became unmanageable by tempest the owner would not be liable."

On the other view, the effect of the clause is very one-sided and illogical. The vessel is in fault or is not in fault while the pilot is in charge, then the owner is not liable. But the vessel is in charge of a person for whom the owner is not responsible, e.g., a repairer in dock, and the owner at once becomes responsible, fault or no fault.

In the result, therefore, though I must needs admit the matter is difficult when so many distinguished persons have differed, I end by agreeing with Lord Cairns that damage must be actionable damage and that, therefore, in the present case the owner is not liable. It follows that the appeal should be dismissed. Although I am not in agreement with the majority of your Lordships who prefer what I have called Mellish L.J.'s view, I am glad that there will at least be a clear rule for future cases—namely, that the action which led to the damage must be action attributable to human agency, but, that being found, that the words of the section remain absolute.

LORD SHAW OF DUNFERMLINE. My Lords, my noble and learned friend on the Woolsack has in his judgment narrated the circumstances in which damage was done by the anchor of the steamship *Mostyn* to certain electrical cables lying in the bottom of a waterway or communication passage extending between the King's Dock and the Prince of Wales' Dock, Swansea. These works were part of the undertaking of the Swansea Harbour, vested by statute in the appellants. When the misadventure occurred, the vessel had been in no way abandoned: her officers and crew were all on board.

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Your Lordships are agreed that the damage was done without negligence on the part of either owner or master or their representatives, in respect of which the common law would attach liability for damage. I entirely assent to that view of the facts.

The appellants, however, raise the further question whether, notwithstanding negligence not being established, the shipowners are, under the provisions of s. 74 of the Harbours, Docks and Piers Clauses Act, 1847 (Vict. c. 27), liable to them, the dockowners, for the damage done by the ship to the dock.

That section is in the following terms. [His Lordship read it.] While upon the construction of the words of the statute itself I feel free to confess that I would not personally have found difficulty, yet it has long been plain that most serious difficulty does arise in consequence of the judicial opinions expressed in the House of Lords in the *River Wear Commissioners* v. *Adamson*. (1) The solution of that difficulty is of wide importance.

Prior to that case, the section, when under consideration in Courts of law, had been construed according to what was held to be the plain and comprehensive tenor of the language used in the Act, and the shipowner was made, according to that language and subject to the pilotage exception, answerable for all damage done by the vessel to the harbour or its connected works and that in any circumstances. A powerful Court of Queen's Bench, consisting of Cockburn C.J., Blackburn and Quain JJ., decided the case of *Dennis* v. *Tovell* (2), and in delivering the leading judgment Blackburn J. used these words: "The legislature has put the owner in the same position as a man who keeps a dangerous animal, who must do so at his peril, and be answerable for any injury such animal may do. It enacts simply that the owner shall be liable for whatever damage the vessel may occasion. It appears to me that the legislature has clearly said so, whether it intended it or not."

This judgment was expressly followed in the case of

(1) 2 App. Cas. 743. (2) L. R. 8 Q. B. 10; 27 L. T. 482, 483.

The Merle (1), decided in the Court of Admiralty in 1874 by Sir R. Phillimore.

If this law was not completely overturned by the House of Lords in *River Wear Commissioners* v. *Adamson* (2), it must be conceded that it was severely shaken thereby. So long as that House of Lords judgment stands, the doctrine that the shipowners are liable to the dockowners for all damage to the works caused by the ship, in all circumstances and in whatsoever manner, can no longer be maintained.

Nearly every judge who has spoken upon the subject, not only in *Adamson* (2) but in the various cases thereafter in which *Adamson* (2) has been referred to, has admitted that, while the restriction of liability enforced by this House has, of course, to be deferred to, yet the imposition of unrestricted and comprehensive liability appears, nevertheless, to be in entire accord with the plain and express words of the statute. This is a notable fact.

There seems, indeed, no reason, my Lords, to doubt that the learned judges of the Courts of Appeal in the present case would not have reached any restricted view of the statutory words had it not been for the case of *Wear* v. *Adamson*. (2) All the learned judges make that pretty plainly appear from the opinions which they have delivered. With regard to the case of *Wear* itself, they also indicate the great difficulty which they have either in reconciling that decision with the statute, or in understanding its scope, or discovering, if any, its ratio decidendi. In *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (3), this House, and especially Lord Herschell, plainly found themselves in the same plight. It is the same plight also in which I find myself in this appeal.

The difficulty in regard to *Wear* v. *Adamson* (2) pointedly arises upon the words used by the noble and learned Earl then on the Woolsack, Lord Cairns. It is, nevertheless, our task to escape, if possible, from the " bewilderment " (to use

(1) 2 Asp. M. L. C. 402. (2) 2 App. Cas. 743.
(3) [1894] A. C. 508.

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a not inappropriate expression of Scrutton L.J.) caused by the variety of opinions delivered in this House. My own humble efforts have resulted as follows :—

It is beyond all things important in considering the *Adamson* case, to bear in mind its very special circumstances. These are concisely given in the Lord Chancellor's own words (1) : " On the 17th of December, 1872, the steamship *Natalian* was attempting, under stress of weather, to enter the Sunderland Docks, belonging to the appellants ; while it was still in the open sea, about forty or fifty yards from the pier, it struck the ground, canted with its head to the south, and drifted, bodily, ashore. The crew had been rescued from the ship by means of the rocket apparatus. The tide was low at the time ; and as the tide rose, the flood and the storm drifted the ship against the pier and caused damage." As I read the argument for the shipowners, their main reliance was upon this fact—that the ship was no more than a helpless log ; that all aboard her had been rescued by the rocket apparatus, and that she had been abandoned and was derelict. Sir John Holker, for the owners, put that in the forefront of his argument (2) : " There may be nothing unreasonable," says he, " in holding the owner of a ship liable for ordinary damage caused in an ordinary way, but the legislature never could have intended to make him liable for damage occurring when the ship was no better than a helpless log upon the water, when the master and crew were with difficulty saved from death, and the owner had not any means whatever of exercising any possible control over the vessel." In the course of the appellants' argument, the Lord Chancellor, upon *Dennis* v. *Tovell* (3) being cited, interjected the observation : " The facts there were not the same." It is to be observed accordingly that the one point which was before this House on that occasion was whether such an extremely special case, namely, that of a completely derelict ship, was within the words of the statute; that is to say, whether the owners could have a liability imposed upon them in the

(1) 2 App. Cas. 749. (2) 2 App. Cas. 747.
(3) L. R. 8 Q. B. 10.

case of a ship abandoned, and beyond all human control, and left to the mercy of the elements.

It would be unnecessary to dwell upon this but for the fact that a careful scrutiny of the judgments delivered seems, to my mind, to point conclusively to this, that every one of the judges overcomes the misgiving with which manifestly he viewed a pretty apparent infraction of the comprehensive application of the statute by the explanation of this singularity of fact and his conception as to the element of hardship which thus entered the case. The two main elements of fact were simply: (1.) a derelict ship, all means or chance of possible control over which by human agency had disappeared; (2.) damage to a pier by a ship in that state. It was to a case resting on those special facts that the decision of *Wear* v. *Adamson* (1) applied.

So far as the judgment of the Lord Chancellor was concerned, it is clear that the grounds taken by the learned judges of the Court of Appeal were grounds in which he did not concur. "I do not concur," said he, "in the reasoning of the learned judges of the Court of Appeal"; the noble Earl reached the conclusion which they had reached but on a different ground—a ground which has given rise to much disturbance of the legal mind for two generations.

It may be noted in passing that while the noble Earl stated that if a duty was cast upon an individual by common law, the act of God would excuse him from its performance, yet it was a different case where a man, by contract, accepted the liability; and he further put a statutory liability on precisely the same ground as that of contract, saying (2): "There is nothing impossible in that which, on such an hypothesis, he has contracted to do, or which he is by the statute, ordered to do, namely, to be liable for the damages." Having thus sheared away all reasons for questioning the competency of the statute—to impose effectively a comprehensive liability—his Lordship then states the common law obligation resting upon negligence, by which common law obligation owners of vessels and those

(1) 2 App. Cas. 752. (2) 2 App. Cas. 750.

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representing them, were bound, and he then adds the crucial words (1): "In my opinion, it was to meet this state of the law that this section" (s. 74) "was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God." Later he adds: "The clause appears to me to be a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted, and not creating a right of action for damages where no right of action for damages against anyone existed before."

My Lords, I am of opinion that the question is whether the decision of this House rested upon the special and peculiar circumstances of the case, or whether it rested upon a general doctrine of which the first of those sentences is the expression. If the former, the case does not bind this House, or any Court, by a general principle; if the latter, it binds all Courts and this House, the statute must be read in accordance with the doctrine so announced, and that doctrine is part of the law of the land until the legislature be moved to interfere.

The situation accordingly is: Shipowners, as such, are by statute liable to dockowners for "any damage done by such a vessel . . . . to the harbour, dock or pier." Whereas by the doctrine of Earl Cairns in *Wear* v. *Adamson* (2) they are not so liable unless the damage was occasioned by negligence: the statute in short does not increase the common law liability.

As I view the case, the doctrine so expressed, constituting this important exception from express statutory liability, neither was necessary for, nor did it truly underlie, the decision of *Wear* v. *Adamson*. (2) It is a doctrine, I may be allowed to say, very different from that which as lawyers we have been brought up to believe, holding as we do with Blackstone, I. 89, "where the common law and a statute differ,

(1) 2 App. Cas. 751. (2) 2 App. Cas. 743.

the common law gives place to the statute." It is, accordingly, most necessary to consider whether the doctrine so expressed by the Lord Chancellor as to this statute received the assent of this House at large. I am of opinion that it did not.

Before I consider the utterances of the other noble Lords, I may observe that the judgment of Mellish L.J. in the Court of Appeal, which was received with great deference by other noble Lords who addressed the House, itself contained a very striking repudiation of any such doctrine. Said Mellish L.J. (1): "I think, looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by common law; because, if that is not the intention, it is not easy to see the object of the section at all."

I do not find in any of the other judgments in the House of Lords a repudiation of that view, and yet it is an undoubted repudiation of the view of Cairns L.C.

I proceed to the judgment of Lord Hatherley. (2) He says: "I cannot concur in the views expressed in the Court below by some of the learned judges, on the one hand that the damage which was done in this particular case having been caused by what is commonly said to be an accident, but is called in the language technically used in law courts the act of God, namely, a storm, the owner of the vessel would be excused by the section of the Act of Parliament, however construed, from the consequences of that mischief." That appears to me to be a complete contradiction of the view of Earl Cairns, and a denial of the doctrine laid down by him. "The act of God would excuse the owner under the section," says Lord Cairns. "The act of God would not excuse him," says Lord Hatherley. Lord Hatherley goes further into a separate point in the case—namely, whether there is excuse even in the special circumstances of the vessel having been derelict or abandoned, and he appears to incline to the view that the owners were liable

(1) 1 Q. B. D. 553. (2) 2 App. Cas. 752.

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even in the special circumstances of a derelict ship. That, however, is apart from the general doctrine of Lord Cairns to which I have alluded. Lord Hatherley's judgment, along with the judgment of Mellish L.J. to which I have alluded, appears to be, in substance, in direct conflict with the doctrine now being investigated.

Lord O'Hagan bases his judgment entirely upon the peculiar circumstances. He says (1): "It does seem hard that the respondent, having had his ship so injured by the winds and waves on the high seas that its crew, to save their lives, abandoned it, and it was derelict, and was forced by the storm against the pier, should not only have lost its value, 10,000*l.* —save in so far as it was insured—but, in addition, nearly 3000*l.* for mischief done admittedly without fault of his and by the act of God. We must take care that a hard case shall not make a bad law; but we must also take care that we do not attribute to Parliament the intention of injustice so very flagrant, without coercive necessity." And he adds: "I have come to the conclusion, although not without serious hesitation and misgiving, that there is no such necessity, and that, well considered, the statute is not applicable in the peculiar circumstances before us." One would have great difficulty as to Lord O'Hagan's judgment: but that it is an affirmation of the general doctrine laid down by Cairns L.C. can hardly be suggested in view of his own words where he recurs to the general point in this way: "You may have noted that my reasoning has not been precisely that of the Court of Appeal, and that I have not based it altogether upon the legal doctrine as to the act of God." Then the opinion winds up in this way: "The only case cited as touching the present (*Dennis* v. *Tovell* (2)) has no application to it." The House will be pleased to know the reason why. That reason is this: "There, the vessel was not derelict, and the owner may have properly been held liable. Here, on the other hand, in the words of Baron Pollock: 'Out on the high seas she met with certain risks and injuries which compelled her crew to leave her, and

(1) 2 App. Cas. 758, 761, 762. (2) L. R. 8 Q. B. 10.

she became derelict.' And, in my judgment, this ship should be dealt with as if it had been abandoned at the antipodes, and had been ploughing the ocean, without a crew, for years before it was driven against the pier at Sunderland." Lord O'Hagan's affirmation gives no ground for an assertion that he attached the weight of his authority to the general doctrine under discussion—of the liability of owners only in case of negligence. It only establishes and it does establish that in his judgment the owners of the *Natalian* were not liable in the circumstances because she was a derelict ship.

In the result, at the point we have reached, I hold that the general doctrine has not only not been adopted by the two learned Lords last referred to, but has been in substance, either disaffirmed, or shown to be in no way the ground of the judgment to which they themselves ultimately inclined.

The opinion of Lord Blackburn contains much valuable matter, as one would have expected, but it is extremely difficult to extract from it any affirmation of what I might call the Cairns doctrine. It does contain a complete disclaimer of the idea that the statute was not to add, as Lord Cairns' words seem to imply, anything to common law liability. Lord Blackburn said (1): "Reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the legislature was to give the owners of harbours, docks, and piers more protection than they had."

The remedy, his Lordship added, against the trouble of fixing particular persons with liability was "that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel, or by any person employed about the same,' to the harbour." I cannot read that as in any sense confirming the view that this statute was to be interpreted upon the footing that the

(1) 2 App. Cas. 768, 769.

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shipowners escaped all liability, except liability that grounded upon negligence. On the contrary, it seems to me to affirm the proposition that a further and separate liability was imposed by statute, and that it was imposed on the owners qua owners. I am humbly but distinctly of opinion that this is the correct view. To use the language of a Roman lawyer, the liability imposed is not a liability ex delicto, nor is it a liability quasi ex delicto; but it is expressly a liability ex dominio. It is laid upon the owner as owner, and it humbly appears to me that this view is in entire accord with the dicta just cited from Lord Blackburn, and is in entire disaccord with the idea that he concurred in the general doctrine which Lord Cairns had laid down.

I am further of the opinion that Lord Blackburn misconstrued the true import of the judgment of Mellish L.J., a topic upon which I understand my noble and learned friend who is to follow me will deliver a fuller opinion.

The final opinion in *Wear* v. *Adamson* (1) was delivered by Lord Gordon. That learned Lord, after a full survey of the legislative circumstances preceding the Act of 1847, and of that statute itself, dissents from the judgment of the House.

In the result, I am humbly of opinion that the liability of owners for damages done by their vessels to piers and harbours was not limited to damages caused by negligence, and that the dictum of Lord Cairns to that effect was not a part either of the text or of the ratio of the judgment of this House. I do not conceal from your Lordships that I have seldom known a case which has produced so much judicial uneasiness. The most able judgments of the Court of Appeal in this case disclose that. All of these judgments are valuable, and I am not sure that the analysis made by Atkin L.J. differs very much from the results which I have independently come to. I think their Lordships, however, erred in treating the dictum of one judge of the greatest eminence as the judgment of this House, and therefore as necessarily having an effect so general as to include the present case.

It may be asked—if the general doctrine of non-liability

(1) 2 App. Cas. 773.

except in cases of negligence, was not decided in *Wear* v. *Adamson* (1), what was decided ? To that I reply that *Wear* v. *Adamson* (1) was a conspicuous instance of a derelict ship from which all human agency had been withdrawn, and it was on that footing, and upon that speciality, and to that extent alone, that the judgment in *Wear* v. *Adamson* (1) can be applied. I do not say whether or not that can be characterized as a ratio decidendi, and I desire to utter no disrespectful word on that subject, but I must in duty declare that this statute seems to me still to abide in its full and comprehensive application of liability to owners, but that, in deference to *Adamson*, the sole exception, plus the statutory exception of pilotage, is the derelict or abandoned ship case. Respect must be had alike (1.) to the statute in its express and general effect and (2.) to the decision of this House of an implied and particular exception.

Such an exception ought not to be extended or expanded. This House and Courts of Law should resist that. As to *Wear* v. *Adamson* (1), I would only add that if it were construed in the broad sense which with so much misgiving it appears to have been taken to mean, it would seem to me to form a curious intrusion of the judiciary into the province of the legislature : for I cannot doubt that it was the legislature, and the legislature alone (the plain and clear words of the statute being before us) upon whom lay the duty of cutting into those words by an exception equivalent to a pro tanto but a large repeal. The case recalls much older times when the judiciary attempted that. It is recorded that " when Counsel in a case in 1305 argued for a certain construction of the Statute of Westminster Second of 1285, he was cut short by the Chief Justice with the remark : ' Do not gloss the Statute ; we understand it better than you, for we made it.' "

In these times apparently the statute is to be eviscerated by conceptions *not* of the judges who made the law, but their conception of what was the true and correct line of policy which must be supposed to have been in the minds, and conditioned the words, of those who made the

(1) 2 App. Cas. 743.

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statute. I humbly think this to be both legally and constitutionally unsound, even though it be put forward under the guise of construction. Parliament can and does change its own mind, and it will not under the constitution allow that the judiciary should change its mind for it.

My Lords, in my opinion, we best adhere to both legal and constitutional principle when we affirm the statute, and decline to accept—unless it be where there is the clearest judicial decision to that effect—a vital and fundamental alternative which should deeply cut in to the comprehensive words plainly employed by the legislature. I agree with the noble and learned Viscount on the Woolsack, and in the motion which he is to propose to the House.

LORD PHILLIMORE (read by VISCOUNT DUNEDIN). My Lords, about 10.30 P.M. on October 26, 1923, the steamship *Mostyn* was inside the docks of Swansea and about to proceed from the King's Dock to the Prince of Wales' Dock. She was light in water ballast with a high side out of the water, not assisted by a tug but with a dock pilot on board to help the captain, and with an anchor clear and ready to let go as required by one of the by-laws of the harbour. The wind was blowing a gale from about S.W. In these circumstances it was observed that a small steamship, which was preceding the *Mostyn*, had suddenly stopped, it is supposed because of some breakdown of her machinery. But at the trial nothing was proved with regard to the cause. The approach to the dock being thus blocked, the *Mostyn* put her engines astern to take off her way and dropped her anchor to assist in checking herself and to keep herself straight, as otherwise her quarter would have been caught by the wind, and she would have been brought diagonally athwart the entrance. It is not disputed that these were proper and necessary manœuvres. By them the ship was brought up; and then her engines were stopped. After a short while, the leading steamship was able to move on and out of the way, and the *Mostyn* proceeded to get her anchor in, and at the same time to steam ahead.

She had not paid out much chain. The 15-fathom shackle had not reached the windlass. The depth of the water was 30 feet, and there would be several feet from the hawse pipe to the water's edge, so that there would not be much chain dragging on the ground. Now it happens that in these docks just in front of the communication passage leading from the King's Dock to the Prince of Wales' Dock, there is an electric cable belonging to the Postmaster-General lying along the bottom, which at that part is ordinary gravel or sand; and that in the communication passage some little way in where the bottom is cemented there is a bundle of about ten electric cables which belong to the dockowners and which carry light and power about the docks. They lie in a chase way and are uncovered but are not higher than the bottom of the dock.

Shortly after the vessel moved, and as the chain was still being got in, all the lights all over the dock went out, and the dockmaster in charge, realizing that the anchor of the *Mostyn* must have fouled some of these cables, ordered her to go astern and let her anchor down. This she did and tied up against the quay wall in the King's Dock for the night. Next day the divers went down and found two out of the bundle of ten cables underneath the claws of the anchor, not absolutely broken, but pulled out of their place and so damaged that the electric current was cut off. They also noticed that a third cable had been drawn out of its place though it was no longer under the anchor. Besides this they found a part of the Post Office cable which had been absolutely broken lying on top of the anchor near the shackle.

The Postmaster-General made his own claim with regard to the damage done to his cable, as to which there are certain statutory provisions. The cost of repairing the dock cables came to 226*l.* 4*s.* 6*d.*, and it is for this sum that the Great Western Railway Company, as owners of the dock, brought the present suit.

The plaintiffs put their case on two grounds. First, they said that it was bad navigation and negligence on the part

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of those in charge of the *Mostyn* to go ahead before they were certain that their anchor was clear of the ground, and that it was this going ahead and the dragging of the anchor on the ground that caused the fouling of the dock cables. Secondly, they said that, whether it was negligence or not, they were entitled as dockowners, under the provisions of the Harbours, Docks, and Piers Clauses Act, 1847, to have compensation for any damage done to their works by a vessel.

The case was tried before the President, assisted by Trinity Masters. He came to the conclusion that there was no bad navigation, and that upon the authority of the case of *River Wear Commissioners* v. *Adamson* (1) the statutory claim could not be maintained; and he therefore dismissed the action.

The case came before the Court of Appeal, assisted by nautical advisers, and the result was the same in both points. The railway company have now appealed to your Lordships' House.

The President was advised by the Trinity Masters that those on board the *Mostyn* could not properly be found guilty of negligence, and he came to the same conclusion. But he appears to have been brought to this conclusion in some measure because he thought that the sequence of events was that the *Mostyn* caught the Post Office cable first, catching it apparently when she first let go her anchor, and that this encumbrance afterwards prevented her from getting her anchor off the ground before she began to move forward again and so weighed the anchor down that it made it catch the dock cables as she moved forward. This conclusion was attacked because it was founded, at any rate in part, on the view that the first officer had seen the Post Office cable foul of the anchor when the latter was being raised, while he never said this, nor indeed did he say that he sighted the anchor or anything fouling the anchor at all. He knew that there was something foul of the anchor, but he might very well infer this from the fact

(1) 2 App. Cas. 743.

that it did not come up in the usual way, or that the chain continued to lead aft. It remains therefore a matter of uncertainty whether the Post Office cable was fouled in the first instance, as the vessel went in, or whether, as counsel for the appellant contended, the *Mostyn*, when going astern in obedience to the directions of the dockmaster and dragging some of the dock cables with her, then first came into contact with and broke the Post Office cable. It would seem to me, my Lords, that though the President's conclusion was partly founded upon a wrong premise, it is quite as likely to be right as the conclusion contended for by the appellants. For reasons, however, which I am about to give, it seems to me unnecessary to decide this point.

The President went on to accept the contention that it was prima facie negligence to proceed with the anchor dragging on the bottom, or, in other words, to go ahead till they were certain that the anchor was either up to the hawse pipe, or, at any rate, hanging in the water. But notwithstanding this he exonerated the *Mostyn*, because he thought that but for the unexpected incubus the anchor would have been up, and that those in charge of the *Mostyn*, though in some respects negligent, were not responsible for a consequence of their negligence which they could not have foreseen.

I am not quite sure whether this was the view accepted by Bankes and Atkin L.JJ. in the Court of Appeal. It is one on which I should hesitate to put my judgment. If there was negligence, and that negligence caused damage, I doubt whether it would be a defence to say that the damage was not one naturally to be expected. I think the matter may be put on a broader ground which is that which was explicitly taken by Sargant L.J. and, as I gather, by the nautical assessors in the Court of Appeal. In my view those in charge of the *Mostyn* did their best in the circumstances. They were right, as already said, when they lowered their anchor. When afterwards they had to proceed forward and get their anchor, they were bound to have steerage way as soon as ever the anchor was off the ground. It would be, so to speak, a good fault if they got

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their way on rather before the anchor ceased to hold. With that gale and in the position in which they were in the communication passage, it was all important that the ship should be kept heading straight. In difficult circumstances they did their best. This, I may add, is the opinion of the nautical assessors who have advised your Lordships' House, and I therefore conclude that there was no negligence in the navigation of the *Mostyn*.

My Lords, I have now to consider the claim of the railway company preferred by it as owner of the dock under s. 74 of the Harbours, Docks and Piers Clauses Act, 1847, and I have to construe that section in the light of the construction placed upon it by your Lordships' House in the case which I have already quoted of the *River Wear Commissioners* v. *Adamson*. (1)

The literal language of the section would lead me to accept the construction put upon the words by Lord Gordon—namely, that they make the owner of any ship which comes into collision with and does damage to the works of a dock responsible for such damage, whether the collision be a fault of himself or his servants or no; that, in fact, the shipowner is made an insurer. But the decision of this House, passed in conformity with the opinions of the majority of the noble Lords who sat, forbids me to give so wide an application to the section. At the opposite end of the line comes the suggestion that the section gives no rights to the dockowner other than those which he possesses at common law and only gives him a power to ensure that those rights shall be fruitful by enabling him to detain the ship till satisfaction is made. No doubt this by itself would in the year 1847 have been a valuable privilege, because till the Admiralty Court Act, 1861, the Admiralty Court would have had no jurisdiction in such a matter, and therefore the ship could not have been arrested. Neither would the Act 9 & 10 Vict. c. 99, s. 41, have helped, because that only gives the power of detention in the case of damage to ships, buoys or beacons and applies only to foreign ships.

(1) 2 App. Cas. 743.

It was not till 1854 that the Merchant Shipping Act of that year (17 & 18 Vict. c. 104, s. 527) gave the power which is now reproduced in the Merchant Shipping Act of 1894 (57 & 58 Vict. c. 60, s. 688), and even so the power of detention is only in respect of foreign ships.

Valuable, however, as this privilege of detention was and still is, at any rate for England and Ireland, it is obvious that the section does more than give this privilege. It does confer rights and create liabilities not known to the common law, and this was clearly the view of the House in the *River Wear* case. We must find some halfway position between these two extremes, and the question is where the line is to be drawn.

When the *River Wear* case was before the Court of Appeal, the judges differed in the reasons which they gave for absolving the shipowners from liability. Pollock B. decided the case upon a point of his own connected with the special circumstances of that accident.

Sir George Jessel M.R., Kelly C.B. and Denman J. thought that in every Act of Parliament imposing a duty or a liability, however general and absolute the language might be, it was always to be supposed that there was an exception for accidents occasioned by an act of God or of the King's enemies, and that the misfortune in that particular case could be said to have been due to an act of God. This untheological expression is well understood by lawyers, and I should not myself have said that in the *River Wear* case the misfortune was the result of an act of God in its accepted legal sense. It was merely an ordinary case of perils of the seas. But, however that may be, your Lordships' House discarded this reasoning and refused to read into the statute this unexpressed exception.

Kelly C.B. and Denman J. also relied upon the fact that at the moment when the vessel made its impact on the pier, there was no one on board, and therefore no one in charge of the vessel; and they thought that the reference in s. 74 to the liability of the master or person in charge, implied that the owner of the abandoned vessel was not to be made liable for its drift.

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But neither did that view commend itself to your Lordships' House. Lord Blackburn pointed out that the ship was not a derelict, and, if in any case a ship by the act of man is brought to such a position that in the ordinary course with tide or wind she will thereafter come into collision with a pier, the fact that she is then left by her master and crew, ought not in reason to affect the question of the owner's liability.

There are two ways of reading the judgment of Mellish L.J. According to one view the liability would accrue whenever the accident was due to some act of man. According to the other it would only accrue when the accident was due to the negligent act of some man, it does not matter who. This latter is the view of his judgment taken by Lord Blackburn, though apparently not by Lord Cairns.

However this may be, it seems to me that the ratio decidendi in your Lordships' House is to be found in the adoption of the latter view by Lord Cairns L.C., by Lord Blackburn and, in very hesitating terms, by Lord Hatherley and not expressly dissented from by Lord O'Hagan, that the shipowner is intended to be made liable in cases where the damage can be traced to the actionable negligence of some person, or, to put it in other words, to negligent human agency, the idea being that in this case the shipowner should be as it were, the medium through which the dockowner recovers his damage, that he should directly compensate the dockowner and bear the loss if it is due to the negligence of himself or those for whom he is responsible, but get reimbursement from any ulterior person who is the real cause of the mischief. For instance, if ship A, by its bad navigation, forced ship B into collision with a pier, the owner of ship B would pay the pierowner and look to recover over against the owner of ship A; or if a shipowner has placed his ship in the hands of a ship-repairer, and the ship-repairer or his servants has done damage to a dock, the shipowner would have to pay the dockowner and seek his remedy against the ship-repairer, while at the same time the right of an employer to recover against his own negligent servants is affirmed.

Lord Cairns calls the section a clause of procedure only, and says that it deals with the mode in which a right of action for damages already existing should be asserted and does not create a new right. This, speaking with all respect, is a juridical idea of an unusual nature, because a right in A to recover from B is a different right to that of A to recover from C. But for the purpose of the statute, Lord Cairns treats the right as one in the abstract which exists in A and can be transferred from being one against B to being one against C. Actionable human agency is, therefore, according to these judgments, the test. This view receives confirmation, as he says, from the fact that an exception is made in the case of compulsory pilotage.

I read Herschell L.C.'s judgment in the case of *Arrow Shipping Co.* v. *Tyne Improvement Commissioners* (1) as putting this construction upon the judgment in the *River Wear* case.

The contention of the railway company before your Lordships was that human agency of any kind, though innocent, made a shipowner liable, and if that were so, they would succeed in the present suit. But the result of my study has brought me to the conclusion that this is not what is intended by the judgment of the House on the *River Wear* case. And as the proof given at the trial in the present case does not indicate that there was negligence on the part of any one, I think the shipowners are entitled to succeed.

If it had appeared that the leading steamship had been negligent, and that the ultimate misfortune was the consequence of that negligence, then I suppose the shipowners would have had to pay, and to look to recover over against the owners of the leading steamship.

LORD BLANESBURGH. My Lords, I accept with all your Lordships the view just expressed by Lord Phillimore that the master and dock pilot of the *Mostyn* are to be absolved from any imputation of personal negligence in connection with the navigation of their vessel on this occasion. I reach

(1) [1894] A. C. 508.

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that conclusion for the reasons given by my noble friend, and I advance at once to the inquiry whether in view of that finding the statutory liability of the respondents as owners of the *Mostyn* is at an end or whether it still subsists.

The hypotheses of fact upon which this inquiry must proceed are now made clear. It is convenient to collect them. They are first, that at the relevant time the *Mostyn* was not under compulsory pilotage, or, in other words, that the respondents are not entitled to rely on the pilotage exception in s. 74. Second: that the damage done by the *Mostyn* to the appellants' harbour property resulted from the voluntary act of her master and pilot. But, third: that it was not due to any negligence on the part either of the respondents, the master or pilot, or of any persons on board of or connected with the vessel at the time. I have myself been helped by this restatement, for, it discloses as in a flash, the correspondence between the facts of the present case and the words of the section in relation to a state of things to which the section has direct reference. The correspondence is striking, so striking indeed, that one is tempted to affirm that had the present dispute been the first to call for judicial determination, it would then have seemed that this statutory liability of the respondents was too plain for argument.

The general intent of the section is now, I think, generally accepted. It has been judicially described in varying terms, but with no different result. I take as a specially apt description the passage already cited from the judgment of Mellish L.J. in *Adamson's* case. (1) "I think," he says, "looking at the language of the section, it clearly was the intention of the legislature to extend the liability of the owners of vessels, in favour of the owners of piers and harbours, beyond the liability which is imposed on them by the common law: because, if that is not the intention, it is not easy to see the object of the section at all." That assertion begs no question as to the precise limits of the extension of liability effected by the section, but it

(1) 1 Q. B. D. 553.

warns a court of construction against the danger of denying its plain meaning to any expression found there, merely in order to avoid the imposition of a liability upon owners of vessels which had not hitherto been part of the law of the land.

Thus duly warned, I find on referring to the words of the section that the owner of every vessel is thereby made "answerable to the undertakers for any damage done by such vessel to the harbour . . . . or works connected therewith," and if there be any doubt as to the generality of that liability, in relation, at all events, to the presence or absence of negligence, with which alone the House is, in the present case, concerned, that doubt is, I suggest, resolved by the contrast to be found in the words which immediately follow "and the master or person having the charge of such vessel *through whose wilful act or negligence* any such damage is done shall *also* be liable to make good the same." The meaning of these latter words is surely quite clear. It is that the master or person having charge of the vessel, in contra-distinction in this respect to the owner, is by them only made liable if the damage done is attributable to his wilful act or negligence. That such is the case, so far as the liability of the master or person in charge is concerned, is the view, amongst others, of Lord Cairns expressed in his judgment in *Adamson's* case at p. 751 of the Report, of Lord Hatherley at p. 753 and of Mellish L.J. in 1 Q. B. D. at p. 553. I fortify myself by reference to these authorities only because of the somewhat different signification attributed to the words by Sargant L.J. in the present case.

It is now possible to arrive at the full effect of the section so far as it applies to a case like the present. It is that the owner of a vessel as such without any qualification in regard to the presence or imputation or otherwise of negligence on his part is made answerable for damage to harbour property done by his vessel: that the master or person having charge of the vessel is *also* fixed with liability to make good the *same* damage, but, in his case, only if the damage be due to his wilful act or negligence, and not otherwise. And, my Lords, I would here observe that this contrast in the

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nature of the liability which by the section is imposed upon the owner on the one hand, and the master, using that term compendiously, on the other, is heightened by the terms of the pilotage exception to which some reference must now be made. That exception, it will be remembered, extends to the owners only. It does not touch the "master," clearly, in my suggestion, because the liability of the owner under the section, exists apart from any question of fault on his part: while in the case of the master his liability is conditioned on personal negligence, not to be excused by the presence of any pilot on board.

And this leads me here to add one further statement as to the section, more general in its application. It is that this statutory liability is imposed upon two classes of persons and upon them only. First, the owner, second the master, with, in his case, the qualification just stated. Nor is there anything on the face of the section to indicate that the owner's liability is in any sense representative. That liability, so far as words can make it so, is, in expression, as final and as personal as is that of the master. The significance of this together with the fact that his liability presupposes no fault on his part will emerge later.

And by these statements progress is made in resolving the one further difficulty which, so far as the present case is concerned, seems to be presented by the wording of the section. That is as to the connotation of the word "damage" as there used. The word, I venture to think, is employed to denote physical or material damage or injury to the harbour or works. If there were any doubt as to its signification when used in relation to the owner, there can, I suggest, be none, when in reference to the same "damage" the master is required "to make it good." And not only by this indication is it shown that the word is being used in a material sense and not as a juridical term. Sect. 74 is one of a fasciculus of clauses (69–76) grouped under the heading: "And with respect to the protection of the harbour, dock, and pier, and the vessels therein, from fire or other injury, be it enacted as follows." And just as that heading refers to "fire or *other*

injury," so it will be found that the penal sections, 69–73, are all directed to the protection and safeguarding of the harbour and shipping against physical injury of one kind or another. Accordingly, I cannot myself doubt that this word "damage" where it occurs in s. 74 is used in that sense also.

For these reasons I can see no escape from the conclusion, proceeding, so far, only upon the plain words of the section, that the liability of the respondents thereunder for the damage here sued for is, in the circumstances now disclosed, clearly established.

And at this point I would observe that in the case of liability imposed upon an owner by s. 56 of the Act in words not more express than the words of s. 74, and by a section too where an unqualified construction is not assisted by such a contrasted provision as is found in s. 74, a majority of this House in *The Crystal* (1) held that an owner was thereby made liable without negligence on the part of himself or of his servants for damage for which, apart from such negligence, he was at common law under no liability at all. I use this case only to indicate that if your Lordships do finally attach liability to the respondents in the present case, you will to this extent merely be bringing s. 74 of this statute into line with s. 56, as already interpreted in this House.

But, my Lords, while it is reassuring that such a decision would involve no new principle and while it is wholesome fully to appreciate, as applied to the facts of the present case, the unambiguous clarity of provisions which must be ignored if the respondents here are to escape liability, I completely recognize that the real difficulty which confronts the House now, is to keep within its proper limits, as applicable to the facts here, its own decision in *Adamson's* case. (2) For I agree, of course, at once, that by the ratio decidendi of that case—if it can be discovered—and by the decision itself—whether its ratio decidendi can be discovered or not—your Lordships are as much bound as is at least every English Court.

There is, however, one circumstance in *Adamson* not yet alluded to which may require your Lordships in the present

(1) [1894] A. C. 508. (2) 2 App. Cas. 743.

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case to regard that decision from a very special point of view. Curiously enough—helpfully enough perhaps one ought to say—three of the noble Lords out of the four who then decided that there was, under s. 74, no liability on the owner were at the same time of the opinion that on the true construction of the section an owner, *on the facts of the present case*, would be and remain liable for the harbour damage. That conclusion is it seems to me implied in Lord Hatherley's speech in the two middle paragraphs of p. 753—which I refrain from setting forth only in the interests of economy of space. It is expressly so stated by Lord O'Hagan and by Lord Blackburn.

At p. 760 of the report, Lord O'Hagan says: "The legislature may have fairly said, that greater protection was due to" [the undertakers] "than they derived from the law which had grown up before that commerce and those works had been created, involving the necessity of safeguards theretofore uncalled for and unknown. Accordingly the legislature made the owner—a person easily and always to be found—'answerable' *as* owner, and dispensed with the proof of negligence or any other proof, save of the fact of injury by the vessel—in all the cases contemplated by the Act."

And amongst these cases, as Lord O'Hagan had previously held, was the case where, as here, the vessel was in charge of a master at the time of the damage done.

But Lord Blackburn is the most express of all. At p. 768, he says: "My Lords, reading the words of the enactment, and bearing in mind what was the state of the law at the time when it was passed, it seems to me that the object of the legislature was to give the owners of harbours, docks, and piers more protection than they had. It seems to have occurred to those who framed the statute, that in most cases where an accident occurs, it is from the fault of those who were managing the ship—and in most cases those are the servants of the owners—but that these were matters which in every case must be proved, and consequently that there was a great deal of litigation incurred before the owner, though he really was liable, could be fixed: and with a view to meet this,

the remedy proposed was that the owner, who was generally really liable (though it was difficult and expensive to prove it), should be liable *without proof either that there was negligence, or that the person guilty of neglect was the owner's servant, or proving how the mischief happened*, and this is expressed by saying that the owners shall be 'answerable for any damage done by the vessel or by any person employed about the same' to the harbour."

My Lords, when you find that three out of four noble Lords who were at one in exempting from liability the owners in *Adamson's* case, are there equally in agreement in the view that owners in the circumstances of this case would be liable, does it, for present purposes, matter what the ratio decidendi of all or any of them was? I greatly doubt. In any case, at the least, these views so expressed strengthen the conclusion at which I would have arrived independently, that Lord Cairns alone in *Adamson's* case (1) committed himself to what I may call the "procedure" view of the section, the only view of it adequate to protect the respondents here from liability. From which consideration this consequence also follows—that if your Lordships, following Lord Cairns, are minded now affirmatively to treat this section merely as one of procedure, thereby exonerating the respondents, you must be prepared also to dissent from the views of the section, as applied to such a case as the present, taken and expressed by a majority of the House in *Adamson's* case itself. (1) For myself, for reasons already given, I am not prepared to do anything of the kind: and to avoid being under that necessity, I am encouraged to criticize with a freedom which otherwise I would have regarded as presumptuous the view that s. 74 is a procedure section only.

My Lords, an examination of Lord Cairns' judgment shows that he was led to this conclusion in the expectation and belief that two main results were thereby attained. First the undertakers were relieved of the burden of finding, for the purposes of suit, the real wrongdoer. The owner in every case was the only necessary defendant, and that was a great concession

(1) 2 App. Cas. 743.

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to the undertakers. Secondly, the owner was not seriously embarrassed by the burden so fortuitously placed upon him, because s. 76 gave him a right over against the actual wrongdoer, whoever he might be.

My Lords, if Lord Cairns had had the opportunity of weighing and considering some of the observations since made upon his judgment, he must, I think, have found that neither of these expectations was realized by the effect he attributed to the section. He must, I think, have seen that, so far as the undertakers were concerned, the advantage presented to them was almost illusory, and he would have realized that, so far as the owner was concerned, to call the section merely a procedure section was to speak of peace when there was no peace. But in my view, if I may respectfully state it, the main objection to the procedure theory is that it is really denied to a court of construction by the very terms of the section itself.

I will deal with these points in their order. As to the first, Atkin L.J. has shown with striking force how negligence cannot be treated as a thing separate from the person alleged to be guilty of it. May I for myself add how difficult both for plaintiff and defendant and how unprecedented it would be to conduct and frame a suit in which negligence had to be proved against the actual wrongdoer but to which he himself need be neither party nor privy? The section on this view of it, while it would apparently sanction a procedure altogether novel as well as highly embarrassing, would really be of no advantage to the undertakers.

Next take the position of the owner. Lord Cairns' view was that the statute in every case gave him his right over against the wrongdoer, and this conclusion encouraged him to read the section as he did so far as it affected the owner. But here, if I may most respectfully say so, Lord Cairns overlooked the fact that just as the section itself imposes its statutory liability only upon the owner and, subject to conditions, upon the master, so by s. 76, the last of this fasciculus of clauses, it is, as you would expect, only against the negligent master that the owner is given a right of recourse. If the negligence causing the damage

was that of any one else—the hirer, the ship repairer, any one on board but not in charge—the section, on this procedure view of it, would leave the owner to bear the burden himself, a consequence not anticipated by Lord Cairns. And is there not to be found in this consideration the strongest argument of all against this procedure theory? The section, as an enactment, imposes liability for the benefit of the undertakers on two classes exclusively—namely, owners and masters of vessels. Sect. 76 adjusts the incidence of that liability between these two, and it goes no further in the way of adjustment, because there is no other liability to adjust. To avoid any misapprehension I would add here that in my view it is only the first three lines of s. 76 which have reference to the liability imposed by s. 74, the words in s. 76 which immediately follow are concerned primarily, and I think exclusively, with the penalties or costs incurred under the other sections of the group.

But lastly, my Lords, the procedure view of the section is, I very respectfully suggest, not open on the construction of the section itself. The procedure construction gives no weight to the distinction in this matter of negligence there drawn between the liability thereby imposed upon the owner and that imposed upon the master. That construction requiring also, as it does, personal or imputed negligence on the part of the owner in every case gives the go-by to the limited application of the pilotage exception already alluded to. Lastly, it does not inquire how the conception of unrestricted representative liability is, on construction, permissible, when by the section itself the statutory liability is confined to the owner and the master exclusively.

For all these reasons, my Lords, treating this matter as one open to the House to determine, I express the view with the utmost reverence for any opinion of Lord Cairns that this procedure construction of the section is not admissible.

But I may properly be asked whether in saying so much I am loyally recognizing that the House is bound by its own order in *Adamson's* case (1), and whether I have governed myself accordingly. My Lords, speaking for myself, I am

(1) 2 App. Cas. 743.

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glad to be bound by the decision in *Adamson*. Had I then been a member of this House I would have agreed entirely with the conclusion reached by the majority. Accepting, in the words of Lord Cairns (1), the position that the injury there was one "that could not have been prevented by any human instrumentality, but that it was occasioned by a vis major, namely, by the act of God in the violence of the tempest," I should have reached the conclusion that the owners were free of liability on two separate grounds, each quite satisfactory to myself. The first would have been that the liability imposed by the section on the owner in relation to his ship was intended to be of the *Rylands* v. *Fletcher* (1) type and was thus subject, as that liability always is, to the reservation that the damage is not attributable to an act of God—to what Lord Blackburn in *Adamson's* case called a common misfortune. Alternatively I should have arrived at the same conclusion on the ground indicated by Sir G. Jessel, to which no answer, so far as I can find, has ever been given and which is to me quite satisfactory.

My Lords, Sir George Jessel—I refer to him alone: I except from the reference both Kelly C.B. and Denman J.—found, as I think, the key to the section on this point, not, as did Kelly C.B. and Denman J., in the words of substantive enactment alone, but in these words taken in connection with the pilotage exception. My Lords, here I entirely agree with my noble friend Lord Dunedin, if I may respectfully say so, that this House in *Adamson's* case must be taken to have been of opinion that an exception of an act of God could not be read into the words of enactment here standing alone. But Sir George Jessel, unlike Kelly C.B. and Denman J., did not I think do so.

He pointed out that under that exception, where a vessel in charge of a pilot was overwhelmed by tempest, there would be no liability either on the owner, by reason of the exception, or on the pilot under the law. In that case, therefore, any damage done by the vessel to the harbour would have to be borne by the undertakers. Could it in these circumstances be supposed—this is how I paraphrase his meaning—

(1) 2 App. Cas. 749.

that the legislature had in the same event by the substantive words of the clause imposed a liability on the owner for the irrelevant reason that there was no pilot on board ?

The same view might perhaps be expressed thus. As Lord Blackburn indicated in *Adamson's* case (1) when dealing with *Paradine* v. *Jane* (2), the exception of an act of God may be implied in the terms of an instrument imposing the liability ; it need not be positively expressed. Is not such an exception necessarily implied in this section by the presence there of the pilotage exception ? The legislature has exempted the owner from liability when his vessel at the time of doing the harbour damage is in the hands of a pilot to whose appointment he has had to submit by the constraint of temporal authority. Is it to be supposed that the legislature, when giving this exemption was not proceeding upon the footing that under the section apart from the exception the owner was already immune in a case where the navigation of the ship had been taken out of his control not by a mere pilot imposed upon him by administrative constraint but by an irresistible and unsearchable Providence nullifying all human effort ?

My Lords, the announcement by noble Lords in *Adamson's* case (3) to the effect that the Court of Appeal had been too ready to imply from a liability imposed by statute an exception in favour of an act of God, precludes me I do not doubt from expressing, as now permissible, the first of the reasons above given. But I do not find that what Sir George Jessel really, as I believe, intended has ever been dealt with adversely by any one in this House, and it seems to me that Lord Blackburn and Lord O'Hagan were in no way opposed to that view, while Mellish L.J.'s human agency limitation was merely a paraphrase of it stated as a result. I believe, therefore, that I am still entitled to hold and express it.

But if I must, with *Adamson* before me, cherish both of these views only for my own private and personal satisfaction, I have still remaining a sufficient justification for the opinion I hold that a decision in favour of the respondents here is quite consistent with the decision in

(1) 2 App. Cas. 771. (2) Alleyn, 26. (3) 2 App. Cas. 743.

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Adamson's case. (1) I find that justification in the fact that it was I think the opinion of three, as it was certainly the expressed opinion of two, of the noble Lords who concurred in the decision in *Adamson* (1), and I am not required to particularize the reasons they gave for that conclusion.

The result, in my view, is that the owner of a vessel has, under this section, been made answerable to the undertakers for the damage referred to in the section, with no obligation on the part of the undertakers to prove more against him than that the damage was done by his vessel and that he was her owner at the time. To such a claim when so far proved only two defences are open to the owner:

(*a*) the pilotage exception;

(*b*) that the damage was in fact attributable to the agency of what, in the language of a simpler age, is known to the law as an act of God.

The object of the section being to provide exceptional protection for the undertakers, I do not myself feel that the enactment on this view of it imposes on owners of vessels a burden that can fairly be regarded as oppressive.

On the whole case accordingly I concur in the motion made by the noble Viscount on the Woolsack.

Order of the Court of Appeal reversed, and judgment entered for the appellants for the sum of two hundred and twenty-six pounds four shillings and sixpence (226*l.* 4*s.* 6*d.*). *The respondents to pay the general costs of the action in the Courts below and also the general costs of the appeal to this House. The appellants to pay the costs here and below in respect of the issue of negligence, to be set off. Cause remitted back to the Admiralty Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, December 19, 1927.

Solicitor for the appellants: *A. G. Hubbard.*

Solicitors for the respondents: *Ingledew, Sons & Brown, for Ingledew, Sons & Crawford, Swansea.*

(1) 2 App. Cas. 743.

[PRIVY COUNCIL.]

ATTORNEY-GENERAL FOR NOVA SCOTIA . . . . . } APPELLANT;

AND

LEGISLATIVE COUNCIL OF NOVA SCOTIA . . . . . } RESPONDENTS.

J. C.*
1927
Oct. 18.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Canada (Nova Scotia)—Legislative Council of Nova Scotia—Constitution of Council—Tenure of Office—R. S. N. S., 1923, *c.* 2.—*British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 88.

In answer to questions referred to the Supreme Court of Nova Scotia by the Lieutenant-Governor of that Province:—

Held, (1.) that the Lieutenant-Governor, acting by and with the advice of the Executive Council, has authority to appoint in the name of the Crown, by instrument under the Great Seal of the Province, members of the Legislative Council of the Province, although by the appointment the total number of members would (*a*) exceed twenty-one, or (*b*) exceed the total number of members who held their offices as members at the Union mentioned in s. 88 of the British North America Act, 1867.

(2.) The present total number of members of the Council is twenty-one, but the number can be increased by the Lieutenant-Governor in Council.

(3.) The tenure of office of members appointed prior to May 7, 1925, is during the pleasure of His Majesty, represented in that behalf by the Lieutenant-Governor in Council.

Pro forma judgment of the Supreme Court of Nova Scotia affirmed.

APPEAL (No. 41 of 1927) from a judgment of the Supreme Court of Nova Scotia (October 23, 1927) upon questions referred to that Court by the Lieutenant-Governor relative to the constitution of the Legislative Council of Nova Scotia, and the tenure of office of its members.

The questions referred, the facts, and material statutory provisions, also the opinions expressed by the learned judges of the Supreme Court of Nova Scotia, appear from the judgment of the Judicial Committee.

* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD WRENBURY, LORD WARRINGTON OF CLYFFE, and MR. JUSTICE DUFF.

J. C. 1927 — ATTORNEY-GENERAL FOR NOVA SCOTIA v. LEGISLATIVE COUNCIL OF NOVA SCOTIA.

1927. July 18, 19. *W. L. Hall K.C.* (*Attorney-General for Nova Scotia*) and *S. E. Pocock* for the appellant.

Stuart Jenks K.C. and *W. C. Macdonald* for the respondent Council.

[Reference was made to *Lord Leconfield* v. *Thornely*. (1)]

Oct. 18. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal, which is brought by leave of the Supreme Court of Nova Scotia, raises some questions of great importance relating to the Constitution of that Province.

On May 14, 1926, the Lieutenant-Governor of Nova Scotia in Council, acting under s. 226 of the revised statutes of the Province, referred to the Supreme Court of Nova Scotia for hearing and consideration the following matters :—

" 1. Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many members of the Legislative Council of Nova Scotia that the total number of the members of such Council holding their offices or places as such members would (*a*) exceed twenty-one, or (*b*) exceed the total number of the members of said Council who held their offices or places as such members at the Union mentioned in s. 88 of the British North America Act, 1867 ?

" 2. Is the membership of the Legislative Council of Nova Scotia limited in number ?

" 3. Is the tenure of office of members of the said Council appointed thereto prior to May 7, 1925, during pleasure or during good behaviour or for life ?

" 4. If such tenure is during pleasure, is it during the pleasure of His Majesty the King, or during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia ? "

(1) [1926] A. C. 10.

The matters so referred to the Supreme Court were heard and considered by a Court consisting of four judges, who differed in opinion. The Chief Justice answered parts (*a*) and (*b*) of question No. 1 in the affirmative. His answer to question No. 2 was that at present a full house is twenty-one members, but the number can be increased at any time by the Lieutenant-Governor. His answer to question No. 3 was "during pleasure"; and his answer to question No. 4 was "during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council for Nova Scotia." The opinion of Chisholm J. was substantially in agreement with that of the Chief Justice; but Mellish and Carroll JJ. took other views. Thereupon the Supreme Court, in accordance with r. 3 of the rules regulating appeals to His Majesty in Council from Nova Scotia, certified pro forma for all purposes of appeal to His Majesty in Council that its opinion on the matters referred to with the reasons therefor was according to the opinion of the Chief Justice and his reasons therefor, and ordered that final judgment be entered accordingly pro forma for all purposes of appeal to His Majesty in Council. It is from the judgment so pronounced that this appeal is brought.

In order to arrive at a decision on the matters in controversy, it is necessary to go some way back into the history of Nova Scotia. There had been for some time a Council with legislative and executive authority, when, on February 6, 1838, Her Majesty Queen Victoria issued her Commission to the Earl of Durham appointing him Captain-General and Governor-in-Chief of the Province, and directing that (in addition to the general Assembly of freeholders and settlers referred to in the Commission) there should be within the Province two distinct and separate councils to be respectively called the Legislative Council and the Executive Council and to have the powers therein mentioned; and the Commission proceeded as follows: "And we do hereby appoint and declare that the said Executive Council and the said Legislative Council respectively, shall hereafter consist

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of such and so many members, as shall from time to time for that purpose be nominated and appointed by us, under our sign manual and signet, or as shall be provisionally appointed by you, the said John George, Earl of Durham, until our pleasure therein shall be known. Provided, nevertheless, and we do hereby declare our will and pleasure to be that the total number of the members for the time being of our said Executive Council, resident within our said Province, shall not at any time, by any provisional appointment, be raised to a greater number in the whole than nine, and that the total number of members of the said Legislative Council, resident within our said Province, shall not at any time by any such provisional appointments be raised to a greater number in the whole than fifteen; and we do further direct and appoint that five members of our said Executive Council shall be a quorum for the despatch of the business thereof, and that eight members of our said Legislative Council shall be a quorum for the despatch of the business thereof; and we do further direct and appoint that the members of our said respective Councils shall hold their places therein during our pleasure and not otherwise." The Commissions subsequently issued to Sir John Colburne (afterwards Lord Seaton) in December, 1838, to Mr. Charles Poulett Thomson (afterwards Lord Sydenham) in September, 1839, to Sir Charles Bagot in October, 1841, and to Sir Charles Theophilus Metcalfe in February, 1842, appointing them successively to be Captains-General and Governors-in-Chief of Nova Scotia, contained directions as to the constitution and appointment of the two Councils similar to those contained in Lord Durham's Commission. In the Commission issued to Earl Cathcart on his appointment to the Governorship in March, 1846, the same directions were repeated with the substitution of twenty-one for fifteen as the maximum number of members of the Legislative Council who might be provisionally appointed by the Governor; and like directions were contained in the Commissions issued successively to the Earl of Elgin in October, 1846, to Sir Edmund Walker Head in September, 1854, and to Viscount Monck on November 2,

1861. As the Commission to Viscount Monck remained in force until the Confederation of Canada in 1867, it is desirable to quote here the exact terms of the directions as to the number and constitution of the Legislative Council which were contained in that Commission. They ran as follows: "And we do hereby declare our pleasure to be that the said Legislative Council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our sign-manual and signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said Council during our pleasure: Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of the members of the said Legislative Council for the time being resident within our said Province shall not at any time by any such provisional appointments be raised to a greater number in the whole than twenty-one."

This, then, was the position when the British North America Act of 1867 was passed. That Act provided (by s. 88) as follows: "The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the union until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected." By s. 92, head 1, of the same Act it was provided that in each Province the Legislature might exclusively make laws in relation to "the amendment from time to time, notwithstanding anything in this Act, of the constitution of the Province, except as regards the office of Lieutenant-Governor." By an Act of the Province of Nova Scotia passed on April 18, 1872, it was enacted as follows: "After the passing of this Act the appointment of members of the Legislative Council in the Province of Nova Scotia shall be vested in the Lieutenant-Governor, who shall make such appointments in the Queen's name by instrument under the Great Seal of the

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Province." In the revised statutes of Nova Scotia of 1923, c. 2, the above enactment appeared in the following form: "Sect. 1.—In this chapter, unless the context otherwise requires, the expression 'Council' means the Legislative Council. Sect. 2.—The appointment of members of the Council is vested in the Governor-in-Council, who shall make such appointment in the name of the Crown by instrument under the Great Seal of the Province." The word "Governor" in this enactment is defined as meaning the Lieutenant-Governor. Lastly, by an Act of the Province passed on May 7, 1925, the section last quoted of the revised statutes of 1923 was amended by adding thereto a provision that every member of the Council thereafter appointed should hold his seat in the Council for the term of ten years from the date of his appointment. It is by reason of this enactment that the third question referred to the Supreme Court was confined to members appointed before May 7, 1925.

These being the relevant statutes and documents, their Lordships proceed to consider the questions referred to the Supreme Court in their order.

The first and second questions may conveniently be dealt with together.

It is plain from the above statement that the Commissions issued to successive Governors from the year 1838 until the Union of Canada did not by their terms impose any limit upon the number of members of the Legislative Council of the Province who might be appointed by the Sovereign. There was indeed a limit—originally of fifteen and afterwards of twenty-one—upon the number of such members who might be provisionally appointed by the Governor subject to confirmation by the Queen; but this provision in no way purported to restrict the power of the Queen herself to appoint "such and so many members" of the Council as she should from time to time think fit. In the year 1838, when the number of Legislative Councillors to be provisionally appointed by the Governor was limited by the Commission to fifteen, Queen Victoria, in fact, appointed nineteen such

Councillors; and, although the number was never, in fact, raised above twenty-one, there was nothing in the Commissions which would have prevented Her Majesty from so raising the number at any time during that period.

Then was there anything outside the Commissions to limit the number to twenty-one? For this purpose stress was laid on behalf of the respondents on a correspondence which passed between the Lieutenant-Governor for the time being of the Province (Viscount Falkland) and Lord Stanley as Colonial Secretary in the year 1845; and it is true that in a letter dated August 20, 1845, Lord Stanley seemed to concur in the view that, as a part of certain changes then contemplated, the number of Legislative Councillors might be fixed at twenty-one. But in the Commission issued to Lord Cathcart shortly after the date of this correspondence, while the maximum number of provisional appointments to the Council was for the first time raised to twenty-one, no limit was placed upon the number of members who might be permanently appointed by the Sovereign; and the inference must be that it was the intention of Queen Victoria, while in practice confining her appointments to twenty-one, not to impose any limit on her own power to make appointments exceeding that number. Similar observations apply to a letter of May 4, 1846, written by Mr. W. E. Gladstone as Secretary of State for the Colonies; and it is noticeable that in February, 1864, the Duke of Newcastle, while declining on grounds of policy to advise Her Majesty to increase the number of the Council above twenty-one for the mere purpose of giving a majority in that body to the Government of the day, expressed no doubt as to the power of the Queen to take that course if she had thought fit to do so. Their Lordships find nothing in this correspondence to limit the number of the Legislative Council.

But it was argued that s. 88 of the British North America Act, which provided that the constitution of the Legislature of Nova Scotia should, subject to the provisions of that Act, "continue as it existed at the union" until altered under the authority of the Act, had the effect of limiting the number

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of Legislative Councillors either to eighteen—the number of Councillors who were actually in office at the date of the union—or to twenty-one, the number then ordinarily appointed. Their Lordships are unable to accept this contention. It is the constitution of the Legislature, and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.

It was further argued that, even assuming that before and at the date of the union the Sovereign had power on the advice of her Ministers in the United Kingdom to increase the membership of the Legislative Council of Nova Scotia, that power has not passed to the Lieutenant-Governor of the Province, but remains vested in the Sovereign in this country. Their Lordships cannot agree with that view. Whether on the passing of the British North America Act the power to appoint the members of the Legislative Council was delegated by virtue of that Act to the Lieutenant-Governor of Nova Scotia as the representative of the Crown for all purposes of Provincial government, it is unnecessary to inquire; for at all events that power has been vested in him since the passing of the Nova Scotia Act of 1872 and is now exercisable by him on the advice of his Executive Council. It has not been suggested that either the Act of 1872, which vested the appointment of members of the Legislative Council in the Lieutenant-Governor, or the statute of 1923, which declares the appointment of such members to be vested in the Lieutenant-Governor in Council, was not within the powers conferred upon the Provincial Legislature by s. 92, head 1, of the Act of 1867; and in their Lordships' opinion the right to increase the membership of the Council is not severable from the right to appoint new members. The power which was formerly reserved to the Sovereign was a power to appoint "such and so many members" of the Council as might from time to time appear

expedient; and it is this power—which includes the power of increase—which has now become vested in the Lieutenant-Governor in Council. No doubt the exercise of the Lieutenant-Governor's power to increase the number of Legislative Councillors would be restrained by the considerations of policy set out in the letter of the Duke of Newcastle above referred to; but in law the membership of the Legislative Council is unlimited.

Their Lordships would therefore answer both parts of question 1 in the affirmative and question 2 in the negative.

The answer to the third question referred to the Supreme Court is dictated by similar considerations based on the history of the Province. It was expressly provided by Lord Durham's Commission of 1838 and by the Commissions issued to successive Governors after that time and before the Union that the members of the Legislative Council should hold their places therein during the Queen's pleasure; and, notwithstanding a suggestion made by the Council in the year 1846 that their tenure should be for life, no change was made in the form of the Commissions. It follows that according to the constitution of the Legislature as it existed at the time of the Union, the members of the Legislative Council were appointed during pleasure; and in this respect, as in others, the constitution was continued by s. 88 of the Act of 1867.

With regard to the fourth question, their Lordships agree with the opinion of the Chief Justice and Chisholm J. that the tenure is during the pleasure of the Sovereign represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of the Province. The effect of the Nova Scotia Act of 1872 as re-enacted in the revised statutes of 1923 is to vest in the Lieutenant-Governor in Council the appointment of members of the Legislative Council during pleasure; and in their Lordships' opinion this means that they are to be appointed during the pleasure of the appointing authority. It would be strange if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments

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which might be revoked by the Sovereign acting under the advice of His Ministers in this country; and in their Lordships' opinion this was not the intention or effect of the statutes in question. This view is supported by s. 23, sub-ss. 37 and 39 of c. 1 of the revised statutes, which provide as follows: "(37.) Words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing him, reappointing him, or appointing another in his stead, from time to time, in the discretion of the authority in whom the power of appointment is vested. (39.) Every officer appointed by the Lieutenant-Governor, unless it is otherwise provided in the enactment under which the appointment is made, shall remain in office during pleasure only."

The result is that their Lordships find themselves substantially in agreement with the opinions of the Chief Justice and Chisholm J. on every point; and they will humbly advise His Majesty that the questions referred to the Supreme Court should be answered as follows:—

Question 1 (*a*) and (*b*). Yes.

Question 2. At present a full house is twenty-one, but the number can be increased by the Lieutenant-Governor in Council.

Question 3. During pleasure.

Question 4. During the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

No question arises as to costs.

Solicitors for appellant: *Burchells.*

Solicitors for respondents: *Linklaters & Paines.*

[PRIVY COUNCIL.]

CITY OF HALIFAX . . . . . APPELLANT; J. C.* 1927 Oct. 18.

AND

ESTATE OF J. P. FAIRBANKS AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Power of Province—Taxation—"Business tax"—Direct Taxation—Municipal Tax on Property—Ultimate Incidence—Premises occupied by Crown—British North America Act, 1867 (30 & 31 *Vict. c.* 3), *s.* 92, *head* 2; *s.* 125.

A city charter, enacted by the Legislature of the Province of Nova Scotia, imposed a tax called a "business tax," to be paid by every occupier of real property for the purposes of any trade, profession, or other calling carried on for the purposes of gain; the tax was assessable according to the capital value of the premises. Sect. 394 of the charter provided that any property let to the Crown, or to any person, corporation, or association exempt from taxation, was to be deemed for business purposes to be in the occupation of the owner, and was to be assessed for business tax according to the purposes for which it was occupied.

The respondent estate owned premises which it let to the Crown, represented by the Minister of Railways, for use as a ticket office of the Canadian Northern Railway, the lessee agreeing to pay the business tax. The premises were used exclusively for the purpose above stated. The city assessed the respondent estate to the business tax under s. 394 of the charter:—

Held, that the tax imposed by s. 394, being a tax upon property, was "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867, even though the owner probably would seek to pass it on to the tenant.

The ultimate incidence of a tax should not be applied as a test so as to disturb classifications, well established at confederation, whereby taxes on property or income were classed as direct taxes, while customs or excise duties on commodities were classed as indirect taxes.

Held, further, (1.) that the premises were not excluded from assessment to the business tax on the ground that occupation by the Crown could not be held to be for the purposes of gain; (2.) that the premises were not exempt from taxation by s. 125 of the Act of 1867 as being property belonging to the Crown.

Cotton v. *The King* [1914] A. C. 176 distinguished.

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD WRENBURY, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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City of Montreal v. *Attorney-General for Canada* [1923] A. C. 136 followed.

Judgment of the Supreme Court of Canada [1926] S. C. R. 349 reversed.

APPEAL (No. 79 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 8, 1926) reversing a judgment of the Supreme Court of Nova Scotia (January 17, 1925) which, on an equal division of opinion, affirmed a judgment of a single judge of that Court.

The respondent estate owned premises in Halifax, Nova Scotia, which it let to the Crown, represented by the Minister of Railways and Canals of Canada, by a lease dated March 22, 1922. The lease provided that the premises should be used and occupied only for the purpose of a ticket office of the Canadian Northern Railway; also, that the lessee should pay "the business tax, if any," and the respondent estate all other taxes on the premises. The premises were used solely for the purpose above mentioned.

The assessor for the City of Halifax assessed the respondent estate in respect of the premises for business tax for the year ending April 30, 1925. The assessment was made under the city charter, which was enacted by c. 79 of 1919 of the Nova Scotia statutes, as amended by c. 86 of 1920, and c. 77 and c. 78 of 1921.

The effect of the material provisions of the charter appear from the judgment of the Judicial Committee. Stated shortly, the business tax (which was based upon the capital value of the premises) was payable by the occupier, but by s. 394, where the occupier was the Crown, or any person, corporation, or association exempt from taxation, the owner was to be deemed to be the occupier.

The respondent estate appealed from the assessment to the Court of Tax Appeals, which confirmed the assessment, but stated a case for the opinion of a judge of the Supreme Court of Nova Scotia. The questions submitted were: (1.) Whether the said estate of James P. Fairbanks is legally liable for the payment of the said business tax; (2.) whether s. 394 of the Halifax city charter is intra vires the legislation

of the Province of Nova Scotia; (3.) whether the said Court of Tax Appeals was right in dismissing the said appeal and confirming the said assessment.

The Attorney-General for Canada, the second respondent to the present appeal, intervened.

The trial judge answered all the questions submitted adversely to the respondent estate, and his decision was affirmed by the Supreme Court of Nova Scotia, in banco, upon an equal division of judicial opinion.

Upon an appeal to the Supreme Court of Canada the decision was reversed, the Court (Duff J. dissenting) holding that the tax was not "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867, and that consequently its imposition was ultra vires the Legislature of the Province. The reasons of the majority of the Court, which were delivered by Newcombe J., and of Duff J. in dissenting, appear from the judgment of the Judicial Committee. The appeal is reported at [1926] S. C. R. 349.

1927. July 7, 8. *F. H. Bell K.C.* and *W. Gordon Brown* for the appellants. The tax imposed by s. 394 of the charter is "direct taxation" within the meaning of s. 92, head 2, of the British North America Act, 1867. This case is the exact converse of *City of Montreal* v. *Attorney-General for Canada* (1), and the reasoning in that case applies. The tax was an additional tax on the owners of property used for business, assessed according to the value of the property. It was no more an indirect tax on the occupier than is the real property tax imposed by s. 383 of the charter. The ultimate incidence of a local rate of this character is a subject of such doubt and difficulty, that it cannot be assumed that the Legislature when imposing the tax expected or intended that it would be passed on to the tenant. In the absence of that expectation or intention the tax is a direct tax within the definition of Mill adopted in decisions of the Privy Council. In *Cotton* v. *The King* (2), and other cases in which upon an application of the definitions it was held

(1) [1923] A. C. 136. (2) [1914] A. C. 176.

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that the tax was indirect, the expectation and intention appeared from the nature of the tax itself, in the present case it is based solely upon a theory as to which economists differ. There is no authority for the proposition laid down by two of the judges in the Supreme Court of Nova Scotia, that the Crown cannot trade. The property was clearly not the property of Canada, and so exempt under s. 125 of the Act of 1867.

J. C. Rand K.C. and *Pritt K.C.* for the respondents. The rule based upon Mill's definitions of a "direct tax" and an "indirect tax" is well established, and its application has not been confined to taxes on commodities: *Cotton* v. *The King*. (1) The tax was one imposed in particular cases on the landlord in respect of the user by the tenant, and that gave rise to the inference that it was intended that it should be passed on to the tenant in the form of rent or otherwise. *City of Montreal* v. *Attorney-General for Canada* (2) is distinguishable, as in the present case the interest taxed was the interest of occupation while the tax was payable by the landlord. The business tax was not assessable under the charter, the Crown could not be held to be carrying on a calling for the purposes of gain. Further, the taxation was upon property of the Crown, and therefore was void under s. 125 of the Act of 1925.

Oct. 18. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The substantial question raised in this appeal is whether a tax imposed by the City of Halifax on the estate of John P. Fairbanks as the owner of certain premises in the city is valid, or whether (as the Supreme Court of Canada has held) it is void as not being "direct taxation" within the meaning of s. 92, head 2, of the British North America Act.

The City of Halifax levies under its charter three taxes called respectively a business tax, a household tax and a real property tax. The business tax is payable by every

(1) [1914] A. C. 176. (2) [1923] A. C. 136.

person occupying real property for the purpose of any trade, profession or calling for purposes of gain, and is assessed on 50 per cent. of the capital value of such property. The household tax is payable by every occupier of any real property for residential purposes, and is assessed on 10 per cent. of the capital value of such property. The real property tax is a tax on the owners of all real property and is assessed on its capital value. By s. 391 of the charter real property which is the property of His Majesty used for Imperial Dominion or Provincial purposes, or which is used for certain charitable and other public purposes there described, is exempt from real property tax. By s. 392 no household tax or business tax is to be paid by the occupiers of any of the properties declared exempt from real property tax if such occupiers are the owners or lessees thereof and are occupying the same solely for the purposes of the association or other body specified as entitled to exemption. By s. 394 it is enacted that property let to the Crown or to any person, corporation or association exempt from taxation, shall be deemed to be in the occupation of the owner thereof for business or residential purposes, as the case may be, and he shall be assessed and rated for household tax or business tax according to the purpose for which it is occupied.

The respondent estate is the owner of certain ground floor premises in the city and has let them to His Majesty the King, represented by the Minister of Railways and Canals of Canada, for a term of years, the lease providing that the demised premises shall only be used as a ticket office of the Canadian National Railways, and that the lessee shall pay the business taxes, if any; and the property is in fact used as a ticket office. The respondent estate, having been assessed and rated to business tax in respect of these premises, appealed to the Court of Tax Appeals for the City of Halifax, which confirmed the assessment, and the decision was affirmed by the Supreme Court of Nova Scotia; but on a further appeal to the Supreme Court of Canada that Court (by a majority) set aside the decision of the Courts in Nova Scotia, and held the tax to be ultra vires and void. Hence the present appeal.

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In the course of the argument for the respondent estate it was suggested that an occupation by the Crown cannot be held to be for purposes of gain, and accordingly that the premises in question were not assessable to the business tax; but in their Lordships' view there is no substance in this argument. A business is undoubtedly carried on upon the premises, though on behalf of the Crown, and they are therefore within the ambit of the tax. It was also urged that the tax in dispute is a tax on property belonging to Canada, and so is void under s. 125 of the British North America Act; but their Lordships do not consider that a tax on the owner of premises let to the Crown in right of the Dominion can be held to be a tax on the property of Canada. The real and substantial question to be decided is whether the tax is a direct tax falling within the authority of s. 92, head 2, of the British North America Act, or whether it is an indirect tax and so beyond the powers of the Province under that section; and it was because the Supreme Court held the tax to be indirect that they declared the respondent not legally liable for payment.

The reasons for the decision of the majority of the Supreme Court of Canada were stated by Newcombe J. in a lucid judgment, in the course of which he relied upon the often quoted statement of John Stuart Mill (Political Economy, ed. 1886, vol. ii., p. 415), that "a direct tax is one which is demanded from the very persons who it is intended or desired should pay it," while "indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another." The learned judge held that such an expectation or intention might be inferred from the form in which the tax is imposed, or from the results which in the ordinary course of business transactions must be held to have been contemplated; and he expressed the opinion that in the present case, where the owner is made liable for a tax which is imposed in respect of the purposes for which the tenant occupies the premises, it was only to be expected that the landlord would exact indemnity from the tenant. He held, therefore, that the

tax was an indirect tax upon the tenant and beyond the powers of the Provincial Legislature. On the other hand, Duff J., who dissented from the judgment of the Court, called attention to the great difficulty of determining the actual incidence of local rates on occupiers, building owners and land owners ; and he quoted the opinion of Professor Seligman (Income Tax, 1914), that the incidence of such rates in an urban district is determined by a great variety of factors depending on the demand for houses or business premises and the general state of trade. He declined therefore to act upon any general theory as to such incidence, and held the tax to be direct.

In considering the question so raised it is, their Lordships think, important to bear in mind that the problem to be solved is one of law, the answer to which depends upon a true understanding of the meaning of the expression " direct taxation within the Province " as used in the British North America Act. In this connection some observations made by Lord Hobhouse in delivering the judgment of this Board in *Bank of Toronto* v. *Lambe* (1) are of value. The tax there in question was a tax imposed upon banks and insurance companies carrying on business within the Province of Quebec, and Lord Hobhouse dealt with the point as follows : " First, is the tax a direct tax ? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute ; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words ' direct ' and ' indirect ' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes

(1) (1887) 12 App. Cas. 575, 581.

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remarks to the effect that a tax may be made direct or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

The result of these observations, which are closely applicable to the present case, is that their Lordships have primarily to consider, not whether in the view of an economist the business tax imposed on an owner under s. 394 of the Halifax city charter would ultimately be borne by the owner or by some one else, but whether it is in its nature a direct tax within the meaning of s. 92, head 2, of the Act of Union. The framers of that Act evidently regarded taxes as divisible into two separate and distinct categories—namely, those that are direct and those which cannot be so described, and it is to taxation of the former character only that the powers of a Provincial government are made to extend. From this it is to be inferred that the distinction between direct and indirect taxes was well known before the passing of the Act; and it is undoubtedly the fact that before that date the classification was familiar to statesmen as well as to economists, and that certain taxes were then universally recognized as falling within one or the other category. Thus, taxes on property or income were everywhere treated as direct taxes; and John Stuart Mill himself, following Adam Smith, Ricardo and James Mill, said that a tax on rents falls wholly on the

landlord and cannot be transferred to any one else. "It merely takes so much from the landlord and transfers it to the State" (Political Economy, vol. ii., p. 416). On the other hand, duties of customs and excise were regarded by every one as typical instances of indirect taxation. When therefore the Act of Union allocated the power of direct taxation for Provincial purposes to the Province, it must surely have intended that the taxation, for those purposes, of property and income should belong exclusively to the Provincial legislatures, and that without regard to any theory as to the ultimate incidence of such taxation. To hold otherwise would be to suppose that the framers of the Act intended to impose on a Provincial legislature the task of speculating as to the probable ultimate incidence of each particular tax which it might desire to impose, at the risk of having such tax held invalid if the conclusion reached should afterwards be held to be wrong.

What then is the effect to be given to Mill's formula above quoted? No doubt it is valuable as providing a logical basis for the distinction already established between direct and indirect taxes, and perhaps also as a guide for determining as to any new or unfamiliar tax which may be imposed in which of the two categories it is to be placed; but it cannot have the effect of disturbing the established classification of the old and well known species of taxation, and making it necessary to apply a new test to every particular member of those species. The imposition of taxes on property and income, of death duties and of municipal and local rates is, according to the common understanding of the term, direct taxation, just as the exaction of a customs or excise duty on commodities or of a percentage duty on services would ordinarily be regarded as indirect taxation; and although new forms of taxation may from time to time be added to one category or the other in accordance with Mill's formula, it would be wrong to use that formula as a ground for transferring a tax universally recognized as belonging to one class to a different class of taxation.

If this be the true view, then the reasoning of the majority of the Supreme Court of Canada requires reconsideration. It

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may be true to say of a particular tax on property, such as that imposed on owners by s. 394 of the Halifax charter, that the tax payer would very probably seek to pass it on to others; but it may none the less be a tax on property and remain within the category of direct taxes. Probably no one would say that the income tax levied in this country under sch. A of the Income Tax Act, although levied upon the occupier of property who is authorized to recover it from the owner, is not a direct tax. So, although a customs duty paid by a person importing commodities for his own use is not passed on to any one else, it would hardly be contended that such a duty is a direct tax within the meaning of the British North America Act. It is the nature and general tendency of the tax and not its incidence in particular or special cases which must determine its classification and validity; and, judged by that test, the business tax imposed on an owner under s. 394 is a direct tax.

The authorities cited by Newcombe J. show the use made by this Board of Mill's definition in determining whether a new or special tax, such as a stamp duty, a licence duty or a percentage on turnover, should be classed as direct or indirect; but, with the possible exception of *Cotton* v. *The King* (1), which seems to have turned on its own facts, they do not afford any instance in which a tax otherwise recognized as direct has been held to be indirect for the purposes of the British North America Act by reason of any theory as to its ultimate incidence. On the other hand, the case of *City of Montreal* v. *Attorney-General for Canada* (2), where land in Montreal belonging to the Crown in right of the Dominion and let to a tenant was held to have been validly assessed under a section of the city charter which enacted that persons occupying for commercial purposes land belonging to the Federal Government should be taxed as if they were the owners, appears to be directly in point and to support the contention of the appellant in this case.

Upon the whole their Lordships have come to the conclusion that the tax here in dispute is direct taxation within the

(1) [1914] A. C. 176. (2) [1923] A. C. 136.

meaning of the statute, and accordingly that this appeal should be allowed and the decision of the Supreme Court of Nova Scotia restored, and that the respondent estate should be ordered to pay the costs of the appellant here and below; and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Linklaters & Paines.*
Solicitors for respondents: *Freshfields, Leese & Munns.*

[PRIVY COUNCIL.]

WATSON . . . . . APPELLANT;

AND

HAGGITT AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Partnership—Construction of Deed—"Nett profits"—Different Application of Expression in different Clauses—Deceased Partner—Share of nett Profits payable to Representatives—Surviving Partner's Salary.

A partnership deed provided by clause 3 for the payment of annual salaries to each of the two partners, and for division between them of the nett profits of the partnership business. Clause 21 provided that if either partner should die the surviving partner should pay to the representatives of the deceased partner for each of the succeeding five years a sum equivalent to a one-third share of the nett annual profits:—

Held, that the nett annual profits for the purpose of clause 21 should be calculated without deducting the salary provided for the surviving partner.

There is no rule of general application that in construing a document the same meaning must be assigned to an expression throughout; it is only in cases of doubt or ambiguity that it is necessary or permissible to resort to the device.

Judgment of the Court of Appeal of New Zealand affirmed.

APPEAL (No. 100 of 1927) from a judgment of the Court of Appeal of New Zealand (December 13, 1926) reversing a judgment of Sim J.

The respondents were the executors of the will of A. B. Haggitt, deceased, who down to the date of his death

* *Present:* VISCOUNT CAVE L.C., LORD BUCKMASTER, LORD CARSON, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

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on January 5, 1926, had been a partner with the appellant, J. L. M. Watson, in a business of barristers and solicitors carried on by them under a deed of partnership dated May 18, 1905.

An originating summons in the Supreme Court of New Zealand raised the question whether in computing "the nett annual profits of the said partnership business" for the purpose of clause 21, there should be deducted the salaries provided in the deed as payable to the parties, or either of the said salaries.

The material terms of the deed appear from the judgment of the Judicial Committee.

Sim J. held that the salary provided for the surviving partner, the present appellant, should be deducted. The Court of Appeal (Stringer, MacGregor and Alpers JJ.; Skerrett C.J. dissenting) held that neither salary should be deducted.

1927. Nov. 1. *Maugham K.C.* and *Stamp* for the appellant. *G. B. Hurst K.C.* and *Brasch* for the respondents were not called upon.

Nov. 17. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This appeal raises a question of construction upon articles of partnership between the appellant John Lachlan McGillivray Watson and Arthur Bryan Haggitt. The business of the partnership was that of barristers and solicitors.

The articles were dated May 18, 1905, and the term of the partnership was fifteen years from that date. The term expired on May 18, 1920, but the partners continued the business as partners at will without fresh articles, and, therefore, upon the old terms so far as they were applicable to a partnership at will.

Mr. Haggitt died on January 5, 1926, and the partnership was thereby dissolved. The respondents are his executors.

The articles contained the following clause (No. 21): "If at any time during the term of the said partnership either of

the said partners shall die or become permanently incapacitated for work or shall become insane or of unsound mind to such an extent as to render him unable or unfit to carry on the business of the partnership then and in any such case the surviving or remaining partner shall during the period of five years from the occurrence or happening of such event or contingency pay to the executors and administrators of such partner so dying as aforesaid or as the case may be to the committee or representatives of such partner so incapacitated as aforesaid a sum equivalent to a one-third part or share of the nett annual profits of the said partnership business for each year of the said term of five years."

Taken by itself that clause presents no difficulty of construction. The nett annual profits, by which the amount of the sum to be paid by the surviving partner in each of the five years is to be measured, would be ascertained by deducting from the receipts and earnings of the business such outgoings and expenses as were under the articles or by the use and wont of the partners so deducted during the partnership, the business being for this purpose treated as a continuation of the partnership business: *Ex parte Harper.* (1) A payment, however, which under the articles ceased with the dissolution of the partnership would not be properly deducted.

The appellant, however, contends—and his contention was upheld by the judge of first instance and by one of the four judges in the Court of Appeal—that he is entitled to deduct, in addition to the ordinary business expenses and outgoings, an annual sum payable to him by way of "salary" during the partnership. Whether this contention is correct is the question for decision.

The clause of the articles providing for payment of "salaries" to the partners is clause 3, which is in the following terms: "The said Arthur Bryan Haggitt shall receive a salary of 600*l.* for the first year of the said partnership term, a salary of 750*l.* for the second year of the said partnership term and the said John Lachlan McGillivray Watson shall draw all the nett profits of the said business during the first

(1) (1857) 1 De G. & J. 180.

J. C. 1927 WATSON v. HAGGITT.

two years aforesaid. During each of the third, fourth and fifth years of the said partnership term the said J. L. M. Watson shall draw a salary of 1500*l.* per annum and also one-half of the nett profits for each such year and the said A. B. Haggitt shall draw a salary of 750*l.* per annum for each of the said third, fourth and fifth years and also one-half of the nett profits for each such year. Thereafter and during the continuance of the said partnership term the said J. L. M. Watson shall draw a salary of 1500*l.* per annum and one-half of the nett profits each year and the said A. B. Haggitt a salary of 1000*l.* per annum and one-half of the nett profits for each year during the term of the said partnership, and the said partners shall be allowed to draw the aforesaid amounts by monthly instalments in anticipation of their respective shares or profits in the said partnership business."

Clause 5 is a common form of provision for the payment of expenses, outgoings and losses out of the receipts and earnings of the business: "And in case of deficiency thereof then by the said partners in the shares in which they shall for the time being be entitled to the nett profits of the said business."

The contention of the appellant and the judgments of the two judges who decided in his favour are based upon a supposed rule of construction that the same meaning ought to be given to an expression in every part of the document in which it appears.

Applying this supposed rule it is said that "nett profits" in clause 3 and in clause 5 means what is left after the deduction of salaries, and, therefore, it must have the same meaning in clause 21. If this conclusion were logically applied the "salary" of A. B. Haggitt should also be deducted and paid to his executors, but the absurdity of paying a "salary" to the executors of a dead partner who cannot give any assistance in the business is recognized, and the judges who were in the appellant's favour stop short of the logical application of their conclusion by deciding that the "salary" of the appellant alone ought to be deducted.

The truth is there is no rule of such general application as is contended for by the appellant. A difficulty or ambiguity may be solved by resorting to such a device, but it is only in such cases that it is necessary or permissible so to do.

In the opinion of their Lordships it is in the present case quite clear that in clause 21 the expression "nett profits" has a different application to that which it has in clause 3 and clause 5. Clause 21 is dealing with a state of things wholly different from that dealt with in clause 3. The partnership is dissolved, the "salaries" which were payable "during the continuance of the partnership term" have ceased and the business is being carried on by the appellant on his own sole account and for his own benefit, the annual sum payable to his deceased partner's executors being, in substance, purchase money for his interest in the assets of the business. Under such circumstances it is impossible to hold, without an express provision to that effect, that the partners intended to allow a salary to the surviving partner.

Their Lordships are of opinion that the appeal fails and ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *Cecil J. Wray.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 *Feb.* 14.

DUCKER . . . . . APPELLANT;

AND

REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED . . . . } RESPONDENTS.

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

REES ROTURBO DEVELOPMENT SYNDICATE, LIMITED . . . . } RESPONDENTS.

Revenue—Income Tax—Excess Profits Duty—Sale of Patent Rights—Liability to Assessment—Trade Profit or Capital Accretion—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D.*

The respondent company was formed primarily for the purpose of acquiring the benefit of an invention relating to centrifugal pumps, and it acquired from the inventor his existing patent and two-thirds of any foreign patent rights in respect of the invention, the inventor reserving to himself the remaining one-third. In the course of its business the company acquired further English and foreign patents in connection with the invention. The main business of the company was the granting of manufacturing licences under its patents, but it always contemplated the possibility of a sale of its interest in the foreign patents. The respondent company and the inventor granted to an American company a licence to manufacture under a United States patent with an option to purchase, which was exercised.

Upon an appeal by the respondent company against assessments to income tax and excess profits duty upon a sum representing the company's share of the proceeds of the sale of the United States patent, the company claimed that the sum in question was a capital asset and not a profit of its circulating capital. The Special Commissioners decided that profits on the sale of patents arose in the course of the company's business and were chargeable to tax and duty:—

Held, that the Special Commissioners had not wrongly directed themselves, and that there was ample evidence to support their conclusion of fact.

The test laid down by the Lord Justice-Clerk (Macdonald) in *Californian Copper Syndicate* v. *Harris* (1904) 6 F. 894; 5 Tax Cas. 159 approved.

Collins v. *Firth-Brearley Stainless Steel Syndicate* (1925) 9 Tax Cas. 520 discussed.

Decision of the Court of Appeal [1928] 1 K. B. 506 reversed.

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* *Present:* LORD BUCKMASTER, VISCOUNT SUMNER, LORD WRENBURY, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

APPEALS from orders of the Court of Appeal (1) reversing orders of Rowlatt J., who affirmed determinations of the Special Commissioners, that the respondent company was liable to income tax and excess profits duty upon a sum of 15,898*l*. The facts found by the Special Commissioners were, so far as material, as follows :—

The respondent company was incorporated under the Companies Acts on October 4, 1906, with (inter alia) the following objects :—

(*a*) To purchase or by other means acquire, and protect, prolong, and renew, whether in the United Kingdom or elsewhere, any patents, patent rights, brevets d'invention, licences, protections and concessions which may appear likely to be useful or advantageous to the company, and to use and turn to account and to manufacture under or grant licences or privileges in respect of the same, and to expend money in experimenting upon and testing and in improving or seeking to improve any patents, inventions or rights which the company may acquire or propose to acquire, and in particular to acquire from Edmund Scott Gustave Rees, of Dunscar, Oaken, near Wolverhampton, in the County of Stafford, electrical engineer, and Thomas Parker, Ld., the benefit of certain existing inventions in relation to centrifugal turbine and similar pumps, and with a view thereto, to enter into and carry into effect the agreement referred to in Article 2 of the Articles of Association of this company, with such modifications (if any) as may seem expedient.

(*f*) To improve, manage, develop, exchange, let on lease or otherwise, mortgage, sell, dispose of, turn to account, grant rights and privileges in respect of, or otherwise deal with all or any part of the property and rights of the company.

By an agreement dated October 22, 1906, it was agreed that an agreement under which Thomas Parker, Ld., held a licence from Rees should be cancelled, and that Rees and Thomas Parker, Ld., should sell to the respondent company

(1) [1928] 1 K. B. 506.

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the benefit of the existing patent and of all improvements on the invention to which it related, and also two equal third parts or shares of and in any foreign patents in respect of the invention and the improvements upon it. The remaining one-third part was to remain the absolute property of Rees, and he and the respondent company were to be tenants in common of the foreign patents and were to share in the profits in proportion to their respective interests.

Foreign patents in relation to this invention were granted to Rees in several countries, including France, the United States and Canada.

The respondent company had obtained further patents in the United Kingdom and abroad, but they all related to the original invention or improvements thereof, and throughout the company's existence its assets had consisted entirely of this group of patents and investments. The development of the patents by the granting of manufacturing licences had always been the main business of the respondent company, although the possibility of the sale of foreign patents had always been contemplated by the company in respect of such interest as it possessed in the foreign patents, as the evidence showed that the foreign manufacturers usually required to be given an option of purchase as a condition of agreeing to take a licence.

By an agreement of March 15, 1912, the respondent company and Rees agreed to grant to the Manistee Iron Works Company, of Manistee, Michigan, an exclusive licence to manufacture and sell pumps and other articles under the American and Canadian patents within the United States and Canada for the unexpired residue of the terms of the patents, in consideration of a cash payment of 10,000*l.* and royalties of 10 per cent. on the selling price with a guaranteed minimum, and an option was given to the Manistee company to purchase the American and Canadian patents within certain fixed dates.

The Manistee company paid the 10,000*l.*, but made default in payment of the royalties, and by a supplemental agreement of January 23, 1917, it was agreed (inter alia)

that the Manistee company should surrender all its rights in the Canadian patents, but should continue to hold an option to purchase the United States patent rights outright at any time before January 1, 1918, for the sum of 26,500*l*. The Manistee company exercised its option, and the net share of the respondent company in the purchase money amounted to 15,898*l*. This sum was not included in the respondent company's profit and loss account, but was written off the value of patents in the balance sheet.

Two other agreements were mentioned by the Commissioners. By the first, dated January 11, 1918, an exclusive licence was granted to a Canadian company to manufacture and sell pumps comprised in the Canadian patents, in consideration of a payment of $5000 and a royalty on the selling price with a guaranteed minimum, and it was provided that when the royalties reached the total amount of $90,000 all further royalties should cease and the Canadian patents should be transferred to the Canadian company. By the second, dated June 12, 1919, an exclusive licence was granted to a French company to manufacture and sell under the French patents in consideration of 130,000 francs and a minimum royalty, and it was provided that when the royalties should have reached the sum of 625,000 francs any further royalties should be reduced to 2 per cent.

The sole question for determination was whether the sum of 15,898*l*. was a profit of the respondent company's trade so as to be assessable to income tax and excess profits duty.

The respondent company, while not admitting liability in respect of the sums received under the last mentioned agreements, did not press its objection to the inclusion of these sums in the computations on which the assessments were based.

It was contended on behalf of the respondent company, (*a*) that the patents sold to the Manistee company were capital assets of the respondent company; (*b*) that the respondent company in selling these patents was realizing

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a part of its capital assets; (*c*) that the respondent company had not made a business of buying and selling patents, but had acquired only a part share as tenants in common of a single group of patents relating to one invention and improvements thereof with the main object of holding such patents and obtaining an income from royalties for the use of them; (*d*) that the sum received from the Manistee company was not as a whole or in regard to any part thereof a profit of its trade or business in respect of which it was assessable to income tax or excess profits duty.

It was contended on behalf of the Crown that the sum received from the Manistee company was a receipt of the respondent company's business.

The Commissioners, after taking time for consideration, gave their decision in the following terms: "We the Commissioners who heard the appeal, after considering the facts and arguments put before us gave our decision on the 18th March, 1925, that the profits on sale of patents arose in the course of the appellant company's business and were chargeable to income tax and excess profits duty," and they amended the assessments accordingly.

Rowlatt J. affirmed the determination of the Commissioners. The Court of Appeal by a majority (Lord Hanworth M.R. and Sargant L.J.; Scrutton L.J. dissenting) reversed the decision of Rowlatt J. and the Commissioners. In the opinion of the majority the decision of the Commissioners was a decision of law and was open to revision, and they held that in the circumstances the sale of the United States patent rights was a sale of a fixed capital asset.

1928. Feb. 13, 14. *Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* (with them *Reginald Hills*) for the appellants. In determining whether the sum received from the Manistee company is a receipt of the trade or business for the purposes of income tax and excess profits duty, the test laid down by the Lord Justice-Clerk (Sir J. H. A. Macdonald) in *Californian Copper Syndicate* v. *Harris* (1), which was approved by the

(1) 6 F. 894, 898; 5 Tax Cas. 159, 166

Privy Council in *Commissioner of Taxes* v. *Melbourne Trust* (1), is: "Is the sum of gain that has been made a mere enhancement of value by realizing a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?" If the Commissioners have adopted the right test, the question whether in any particular case the transaction falls on one side of the line or the other is a question of fact for them, and their decision is conclusive if there is any evidence to support it: *T. Beynon & Co.* v. *Ogg* (2); *Gloucester Ry. Carriage and Wagon Co.* v. *Inland Revenue Commissioners.* (3) By its memorandum of association the respondent company was authorized to deal with patents generally, though in fact it has dealt only with patents relating to the Rees invention. The business of the company was to turn these patents to profitable account, either by granting licences or by the sale of patent rights. On the facts there was ample evidence to show that the receipt on this sale was a profit of the trade.

The Court of Appeal have proceeded upon the view that the Commissioners were misled in law by the judgment of Rowlatt J. in *Collins* v. *Firth-Brearley Stainless Steel Syndicate* (4)—a judgment which was reversed by the Court of Appeal after the Commissioners had given their decision—and, proceeding on that view, have found the facts for the Commissioners. But in the *Firth-Brearley Case* Rowlatt J. correctly stated the principle of law, and the ground of the decision of the Court of Appeal was that the learned judge had improperly disturbed the finding of fact of the Commissioners. In the present case the Commissioners have not been misled in law; they have, in effect, found that the money received from the sale of this company's foreign patent rights was a receipt in the course of the company's business, and there is ample evidence to support that finding. The distinction between this case and the *Firth-Brearley Case* is in the findings of the Commissioners.

(1) [1914] A. C. 1001, 1010.
(2) (1918) 7 Tax Cas. 125, 132.
(3) [1925] A. C. 469, 474.
(4) 9 Tax Cas. 520, 564, 568, 576.

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Latter K.C. and *Stamp* (with them *Bowe*) for the respondents. The patents sold to the Manistee company were part of the fixed capital of the respondents, and in selling these patents the respondents were realizing a part of their capital assets. It was no part of the respondents' business to traffick in patents, and the Commissioners have not so found. It is a material fact that the respondents were the owners of two-thirds only of the foreign patent rights, which were unsaleable without the concurrence of the inventor. During the twenty-two years of the respondent company's existence this has been the only sale of patent rights. The main business of the company was the granting of manufacturing licences under patents relating to the Rees invention, and its income was derived from royalties paid by the licensees. The test is: Ought the money received by the company and the inventor for the sale of the United States patents to be brought into the company's profit and loss account? When those patents were acquired by the respondents were they acquired as their stock in trade or as fixed capital? The decision of the Commissioners was founded upon their interpretation of the judgment of Rowlatt J. in the *Firth-Brearley Case* (1), and was wrong.

Sir Douglas Hogg A.-G. replied.

LORD BUCKMASTER. My Lords, this is an appeal from the Court of Appeal by His Majesty's Attorney-General, seeking to reverse a judgment given by that Court (Scrutton L.J. dissenting), overruling a judgment of Rowlatt J., who had affirmed a finding of the Commissioners assessing the present respondents as liable to income tax. The amount of the assessment is not in dispute. The ground of the appeal is this: That the sum to which the respondents have been assessed is a sum which represents part of the capital assets of the company and therefore ought not to be brought into account for the purpose of considering profits subject to income tax.

(1) 9 Tax Cas. 520, 564.

The facts are these: The respondent company was formed on October 4, 1906, for the general purpose of purchasing and acquiring patents, licences and concessions, improving them, using them, and turning them to account, and with the special purpose of acquiring from a Mr. Rees and Thomas Parker & Co., Ld., the rights in regard to a particular invention that had relation to centrifugal turbine pumps. In one of the general clauses of their Memorandum of Association the company had power to sell, dispose, turn to account and grant rights and privileges in respect of all or any part of the property and rights of the company. The special purpose was carried out, but it was not the whole of the patent rights that were acquired; one-third of the rights in foreign patents was reserved to Mr. Rees, and it was in conjunction with him that the company proceeded to carry on its business. The company appear to have decided from the first that they would never manufacture under these patents, but that they would either grant licences to other people to manufacture or deal with the patents in such manner as they thought fit. In the course of their business they acquired further foreign patents—in France, Switzerland, Belgium, Germany, the United States of America and the Dominion of Canada. They dealt with the patent rights with regard to the United States by granting to an American company the right to use the invention which the patent protected upon the terms of paying certain royalties, with an ultimate right of acquiring the whole patent by purchase. It is unnecessary to go through the history of the agreements by which this result was reached, but in the end it led to this conclusion, that there was a substantial sum of money owing in respect of royalties from the American company, and this sum was brought into account with another sum, making up together the purchase price of 26,500*l.* for which the patent was sold. It is the company's share of this sum less proper expenses which has been the subject of the present assessment. The company also dealt with the patents in Canada and the patents in France, not under agreements containing exactly

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Lord Buckmaster.

the same provisions, but by agreements which did enable the people with whom they dealt in each case in certain circumstances to acquire the whole of the patent rights. The contention of the company is that the transaction they entered into with the American company was nothing but the solitary disposition of a capital asset, and that the proceeds arising therefrom should not be brought into account.

My Lords, I think it is undesirable in these cases to attempt to repeat in different words a rule or principle which has already been found applicable and has received judicial approval, and I find that in the case of the *Californian Copper Syndicate* v. *Harris* (1) it is declared that in considering a matter similar to the present the test to be applied is whether the amount in dispute was "a gain made in an operation of business in carrying out a scheme for profit-making." That principle was approved in a judgment of the Privy Council in the case of *Commissioner of Taxes* v. *Melbourne Trust* (2), and it is, I think, the right principle to apply.

My Lords, following from that there are only two things that result. First of all, did the Commissioners in the exercise of their power properly direct themselves with regard to determining whether these moneys were profits in accordance with this test or no? and, secondly, have they in fact done so?

Now the real contention has been chiefly directed to the form of the Commissioners' finding—which it is suggested was based on a mistaken view of the law rather than on a proper consideration of the facts. The reasons urged in support of that view depend to a large extent upon the fact that in a case known as *Collins* v. *Firth-Brearley Stainless Steel Syndicate* (3), a finding of the Commissioners in a closely similar case had been upset by Rowlatt J. on March 2, 1925, and his decision was in turn reversed by the Court of Appeal on June 26, 1925. Now the Commissioners' finding in the present case was on March 18, 1925, and it is therefore

(1) 5 Tax Cas. 159. (2) [1914] A. C. 1001.
(3) 9 Tax Cas. 520.

argued that it is based upon the direction of Rowlatt J., which had been given on the 2nd of the same month, and that as that direction had been held to be unsound it consequently followed that the foundation of their finding had fallen away. My Lords, I think there are one or two comments to be made upon that argument. In the first place, what Rowlatt J. did was to reverse a finding of fact, and the enunciation that he made of the law appears to me to be open to very little criticism. In the Court of Appeal each one of the learned judges who reversed his finding expressly and definitely stated that the circumstances were such as to lead to the conclusion that the finding was essentially a finding of fact by the Commissioners which, when once found, ought not to be interfered with. It seems to me impossible in those circumstances to say that Rowlatt J. in inadvertently disturbing a finding of fact of the Commissioners, which the Court of Appeal restored, was laying down directions which were so unsound that the Commissioners, whose finding in this case followed his judgment, must necessarily have been led to their conclusion by erroneous arguments.

Turning to the findings of the Commissioners, I find that they set out in detail the circumstances connected with the working of this company, and, in particular, the reports, which begin in 1907 and continue down to 1918. These reports show that the directors were contemplating from the beginning the possibility of the sale of some of these patents. It is quite true that they preferred not to sell them if a sale could be avoided, but the statement in para. 11 of the case is quite plain, that "the possibility of the sale of the foreign patents or rights has always been contemplated by the appellant company in respect of such interest as it possessed in the foreign patents." It is one of the foreign patents with which this appeal has to do, and the agreements, which are set out, showing the way in which the foreign patents in the case of France and of Canada have also been dealt with, show that that statement was not a statement of a mere accidental dealing with a particular class of property,

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but that it was part of their business which, though not of necessity the line on which they desired their business most extensively to develop, was one which they were prepared to undertake.

My Lords, I find myself unable to see that in this case the Commissioners have wrongly directed themselves, and, if they have not wrongly directed themselves, there appears to me to be abundant evidence upon which their conclusion of fact could be supported. It is for this reason that I think this appeal should be allowed.

VISCOUNT SUMNER. My Lords, I agree.

LORD WRENBURY. My Lords, I agree, and I do not feel it necessary to add anything at all.

LORD CARSON. My Lords, I also agree.

LORD WARRINGTON OF CLYFFE. My Lords, I agree.

In *Ducker* v. *Rees Roturbo Development Syndicate, Ld.*:

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House. The costs paid by the appellant to the respondents in respect of the hearings in the King's Bench Division and the Court of Appeal respectively to be repaid to the appellant. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, Feb. 14, 1928.

In *Inland Revenue Commissioners* v. *Rees Roturbo Development Syndicate, Ld.*, the judgment was the same, substituting "appellants" for "appellant."

Solicitor for the appellants: *Solicitor of Inland Revenue.*

Solicitors for the respondents: *Sharpe, Pritchard & Co., for Underhill, Neve, Taylor & Co., Wolverhampton.*

[HOUSE OF LORDS.]

ORMOND INVESTMENT COMPANY, LIMITED . . . . . } APPELLANTS;

AND

BETTS . . . . . RESPONDENT.

H. L. (E.)*
1928
Feb. 24.

Revenue—Income Tax—Foreign Shares—Holding for Less than three Years —Basis of Assessment—Interpretation of Statute by subsequent Legislation —Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case V.—Finance Act*, 1924 (14 *&* 15 *Geo.* 5, c. 21), *s.* 26.

By r. 1 of Case V. of Sch. D of the Income Tax Act, 1918, the tax in respect of income arising from foreign stocks or shares "shall be computed on the full amount thereof on an average of the three preceding years as directed in Case I."

By the Rule applicable to Case I., which deals with trades, the tax "shall be computed on the full amount of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been annually made up, or on the fifth day of April preceding the year of assessment."

Rule 1, sub-r. 2, of the Rules applicable to Cases I. and II. prescribes the method of computation where the trade has been set up within the period of three years.

An investment company received during the first year of its existence a dividend from foreign shares and had no other income from foreign possessions. In assessing the company to income tax under Case V. :—

Held (1.) (by Viscount Sumner, Lord Atkinson, Lord Wrenbury and Lord Warrington of Clyffe; Lord Buckmaster dissenting), that r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. had no application to the receipt of dividends on foreign securities, and that the only relevant rule was the Rule applicable to Case I.; and (2.) (by all their Lordships), that s. 26 of the Finance Act, 1924, which was founded upon an erroneous assumption as to the effect of r. 1 of Case V., could not be referred to for the purpose of interpreting that provision.

Held, therefore, that the assessment for the first year should be nil, and for the second year one-third of the amount of the dividend.

Decision of the Court of Appeal [1927] 2 K. B. 326 reversed.

APPEAL from an order of the Court of Appeal (1) reversing an order of Rowlatt J., whereby a decision of the Commissioners for the Special Purposes of the Income Tax Acts was reversed.

* *Present:* LORD BUCKMASTER, VISCOUNT SUMNER, LORD ATKINSON, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

(1) [1927] 2 K. B. 326.

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ORMOND INVESTMENT CO. v. BETTS.

The appellant company appealed to the Special Commissioners against assessments to income tax in the sums of 859,596*l.* and 1,031,372*l.* for the years ending April 5, 1923 and 1924, respectively, made upon it under Case V. of Sch. D of the Income Tax Act, 1918.

The appellant company was an investment company incorporated on June 7, 1922. In August, 1922, the company acquired a large holding of shares in an American company, and on December 7, 1922, it received in respect of this holding a dividend of 601,717*l.* It had no other income from foreign possessions during the tax year 1922–23.

The appellant company made up the accounts of its business for the period of seven months from June 7 to December 31, 1922.

The first assessment was arrived at by taking the 601,717*l.* shown in the seven months account and multiplying it by $\frac{10}{7}$ths, the company having been in existence for ten months of the tax year ending April 5, 1923, and the second assessment by taking that sum and multiplying it by $\frac{12}{7}$ths.

The assessments were made on the basis that the words in r. 1 of Case V. "as directed in Case I." referred to r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., as well as to the Rule applicable to Case I. The first assessment was made according to the Rules applicable to Case VI. as provided by r. 1, sub-r. 2, of the Rules applicable to Cases I. and II., and the second assessment was made according to the provisions of the said r. 1, sub-r. 2.

The Commissioners held that the assessments were made on the right basis, but reduced them to 601,717*l.* in each case.

Rowlatt J. held (1.) that r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. had no application to receipts from foreign possessions, and (2.) that s. 26 of the Finance Act, 1924, which proceeded upon an erroneous construction of the direction in r. 1 of Case V. could not be referred to for the purpose of interpreting that provision. He accordingly discharged the assessment for 1922–23 and reduced the assessment for 1923–24 to 200,572*l.*

The Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) reversed the decision of Rowlatt J. and restored the decision of the Special Commissioners, and in arriving at this conclusion relied to some extent upon the Finance Act, 1924.

1928. Feb. 2, 3. *Maugham K.C.* and *Latter K.C.* (with them *Bremner*) for the appellants. Rule 1 of Case V. provides that the tax in respect of income arising from foreign stocks or shares shall be computed "on an average of the three preceding years as directed in Case I." The Rule applicable to Case I. shows how those three years are to be ascertained and that is the only rule which applies. Rule 1, sub-r. 2, of the Rules applicable to Cases I. and II., provides what is to happen where a trade is set up within the three years and is excluded, not because it is applicable to Case II. as well as to Case I., but because it is irrelevant to this particular matter. It provides a computation other than that of the three preceding years, and it deals with the setting up of a trade within that period. There is no analogy between the setting up of a trade and the buying of an investment. Nor is it relevant to a question of taxation of remittances to consider when the investment was acquired. The appellants' construction of r. 1 of Case V. is supported by the forms of returns provided by the Fifth Schedule to the Act. By Form VII., which deals with persons carrying on a trade, a return has to be made of the profits and gains thereof upon a fair and just average of the three preceding years "or of such shorter period as the trade has been carried on." By Form XI., which deals with persons receiving income from foreign possessions, in the case of income from stocks or shares, the return is to be made of the full amount arising therefrom "on an average of the three preceding years." No reference is made to any shorter period. That distinction is not accidental, but designed. The fact that income may escape taxation affords no ground for departing from the true effect of the Income Tax Acts: *Brown* v. *National*

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Provident Institution (1); *Whelan* v. *Henning*. (2) [They also referred to *Bradbury* v. *English Sewing Cotton Co.* (3)] It is suggested that s. 26 of the Finance Act, 1924, affords a statutory interpretation of these provisions. But, as stated in Maxwell on the Interpretation of Statutes, 1st ed., p. 376; 6th ed., p. 544 "an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it": *Dore* v. *Gray* (4); *Ex parte Lloyd* (5); *Earl of Shrewsbury* v. *Scott* (6); *Attorney-General* v. *Wood* (7); *Attorney-General* v. *Clarkson* (8); *Attorney-General* v. *Fairley* (9); *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (10); *J. & R. O'Kane & Co.* v. *Inland Revenue Commissioners*. (11) There was here no intention to alter the law, and the new rule provided by s. 26 was inserted for the relief of the taxpayer and for nothing else.

Sir Douglas Hogg A.-G. and *Reginald Hills* for the respondent. The Income Tax Act, 1918, contains words imposing a charge on income arising from foreign possessions and rules for computing that charge, and it may be assumed that those rules are so framed as to give complete effect to the charge for which the Act has imposed. The respondent's construction of r. 1 of Case V. involves that the taxpayer shall be taxed for the same number of years as he receives the income; the appellants say that they pay nothing for the first year. The words of that rule "as directed in Case I.," in the respondent's submission, incorporate the rules which apply to Case I., including r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. There is no reason for incorporating one rule and excluding others. The rule solely applicable to Case I. was not needed to define the tax years, because that had already been done by s. 2 of the Act; it was therefore mere surplusage. On the respondent's construction the computation of the charge where less than three years has

(1) [1921] 2 A. C. 222, 259.
(2) [1926] A. C. 293, 296.
(3) [1923] A. C. 744, 759.
(4) (1788) 2 T. R. 358.
(5) (1851) 1 Sim. N. S. 248.
(6) (1859) 6 C. B. (N. S.) 1, 180.
(7) [1897] 2 Q. B. 102.
(8) [1900] 1 Q. B. 156, 164.
(9) [1897] 1 Q. B. 698.
(10) [1921] 1 K. B. 64; [1921] 2 K. B. 403, 418.
(11) (1922) 12 Tax Cas. 303, 348.

elapsed is dealt with in the case of income from foreign possessions as in every other case. No doubt this construction might cause hardship in certain events, but that has been cured by s. 26 of the Finance Act, 1924. The importance of that Act is that it does proceed on the assumption that the respondent's construction is the right one. Where there are two Acts of Parliament dealing with cognate matters the fact that in the later Act Parliament has assumed a particular construction of the earlier Act does, in a case of ambiguity, throw light upon the intention of the Legislature: Maxwell, 6th ed., p. 542; *Rex* v. *Smith.* (1) The Act of 1924 is to be read with the Act of 1918, and the new Rule provided by s. 26 of the later Act is to be regarded as another provision of the principal Act.

Maugham K.C. replied.

The House took time for consideration.

1928. Feb. 24. LORD BUCKMASTER. My Lords, this case affords a further illustration, if further illustration were required, of the confusion of our law upon which the assessment and recovery of income tax depends, but the duty of this House does not extend beyond attempting to call attention to the fact and to point out its consequent hardship upon the subject and its cost and trouble to the Crown.

The appellants are a company incorporated in this country on June 7, 1922, for the purpose of carrying on the business of an investment company, and in August of 1922 they acquired a large holding of shares in an American company called Joseph Benn & Sons. On December 7, 1922, the appellants received a dividend of 601,717*l.* in respect of its holding of the said shares. These are all the material preliminary facts. The law is to be found in the Income Tax Act, 1918.

By s. 1 of this statute it is provided that where any Act enacts that income tax shall be charged for any year at any rate the tax shall be charged for that year in respect of all

(1) (1791) 4 T. R. 414.

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property described or comprised in the Schedules A, B, C, D and E contained in the First Schedule to the statute and in accordance with the Rules applicable thereto. Sch. D states under para. 1 that tax thereunder shall be charged in respect of annual profits or gains arising or accruing to any person residing in the United Kingdom from any property whatever whether situate in the United Kingdom or elsewhere, and, under para. 2, that the tax under that Schedule shall be charged under certain six Cases, the first of which is "Tax in respect of any trade not contained in any other Schedule" and the fifth is "Tax in respect of income arising from possessions out of the United Kingdom." Sets of Rules then follow applicable to the several six Cases. The first of these sets applies only to Case I., the second to Case II., the third to Cases I. and II., and so on, until we reach the Rules applicable to Case V. The first of these is as follows :—

"1. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, as directed in Case I., whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in rule 1 of the rules applicable to Case IV., and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly."

Case I. under Sch. D is, as has been pointed out, the tax in respect of any trade not contained in any other Schedule, and the Rules applicable to Case I. consist, first, of one rule solely applicable thereto and other rules applicable to both Cases I. and II. The rule solely applicable to Case I. is as follows :—

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year

immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

And the relevant rules applicable to Cases I. and II. are these :—

" 1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed.

" (2.) Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

Rule 2 of Case VI. is the only one applicable, and that provides that

" The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such a period, being greater or less than one year, as the case may require, and as may be directed by the commissioners."

The tangle of these cross references is extremely difficult to unravel, and it is plain that the Inland Revenue authorities themselves were, in the first instance, baffled by the problem, nor am I clear that even at this moment the Crown is able to define the exact method by which the liability of the subject should be ascertained. This is shown by the following facts. The first assessment made on the appellants in respect of the 601,717*l.* they had received was made as for the year ending April 5, 1923, and the sum taken as the basis of assessment was 859,596*l.*, or a quarter of a million more than the company had actually obtained ; while for the succeeding year ending April 5, 1924, in respect of this single and same receipt of 601,717*l.* they were assessed in the sum of 1,031,372*l.* The Inland Revenue authorities were not, of course, responsible for the apparent and startling injustice of these assessments ; the result was the result of their attempt honestly to understand an obscure Act of Parliament. It is unnecessary to

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explain the operation by which this conclusion was reached, because the Special Commissioners, before whom the case came, decided that, although the assessment for 1922–23 was correctly made on the basis of the Rules applicable, they, in exercise of the power that they possessed, reduced the assessment to 601,717*l.*, the actual amount received, and, as regards the assessment for the year 1923–24, they decided that the assessment should be based on the average of the income arising up to April 5, 1923, but that it also should be reduced to the sum of 601,717*l.*, that being the amount of the income arising from the investment for a full period of twelve months. The case then came before Rowlatt J., who decided that there was nothing subject to assessment for the year ending April 5, 1923, and reduced the assessment to 200,572*l.* for the succeeding year. From this judgment the Crown appealed, and the appeal was allowed and the assessments restored as the Special Commissioners found them. The basis of the decision of Rowlatt J. was that the phrase "as directed in Case I." embraced only the Rule that exclusively related to Case I., and did not include the Rules that were applicable both to Case I and Case II. The Court of Appeal took the view that the direction under Case V. embraced both sets of the Rules, or, in other words, that a rule was not the less a rule under Case I. because it was also a rule under Case II., and they fortified their judgment by reference to a subsequent statute passed in 1924, which was in the following terms :—

"Finance Act, 1924, Section 26.

"The following Rule shall be added after Rule 3 of the Rules applicable to Case V. of Schedule D :—

"4. Where a person who has been charged with tax in respect of income from a possession out of the United Kingdom proves that the total amount of tax, computed in accordance with Rule 1 of the Rules applicable to Cases I. and II. of Schedule D, which was paid in respect of that income for the first three complete years of assessment during which he was the owner of the possession, exceeds the total amount which would have been paid if he had been assessed for each of

those years on the actual amount of the income of each year, he shall be entitled to repayment of the excess."

From their decision this appeal has been brought.

The main ground of the appellants' contention was that Rowlatt J. was right in confining the direction under Case V. to the Rule exclusively relating to Case I., but they further urged that, even if the other rules were included, they could not, according to the true construction of the Act, apply to the circumstances of the present case, and that it was not legitimate to influence that construction by reference to the provisions of the later statute. It is, of course, quite plain that the Act has confused two totally distinct things—the income from an investment and the profits of a trade. It is as though rules were made for the care and regulation of cattle by reference to a Schedule which related only to the management of an aquarium. In attempting to solve the difficulties I have not overlooked the cardinal principle relating to Acts that impose taxation on the subject, a principle well known to the common law and that has not been and ought not to be weakened—namely, that the imposition of a tax must be in plain terms. In the words of Lord Blackburn in *Coltness Iron Co.* v. *Black* (1): "No tax can be imposed on the subject without words in an Act of Parliament clearly showing an intention to lay a burden on him." It is in that respect kindred to the creation of a penalty or the establishment of a crime. The subject ought not to be involved in these liabilities by an elaborate process of hair-splitting arguments. In this case, however, the imposition of the tax is quite plain; it is the charge in respect of income arising from possessions out of the United Kingdom. The property in dispute, therefore, is primarily plainly made subject to the tax, and the question is whether the directions given as to how that property is to be computed for the purpose of assessing the tax have resulted in taking away the liability. With regard to the first objection, I thought at first that the phrase "as directed in Case I." might be merely repeating what had been said before; that is to say,

(1) (1881) 6 App. Cas. 315, 330.

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that the computation was to take place on an average of the three preceding years, which is what the rule solely applicable to Case I. directs, but to take that view would mean that the words were purely surplusage, and I, therefore, think that we must look to all the rules under Case I. for further directions. Without for the moment regarding what the provisions of these rules may be, I find no means of escaping from the conclusion that the rule that applies also to Case II. as well as to Case I. is none the less the direction in the case of Case I., and I do not think, in considering this point, it is irrelevant to bear in mind that the Act of 1918 consolidated, though it did not attempt to crystallize, the previous statutes, and that the proviso that is now put under the head of Cases I. and II. was originally part of the Rule under Case I.—for convenience and brevity in the consolidation the matter was arranged in the way in which it now stands.

The next difficulty is far more severe. The rules in question have nothing whatever to do with income arising from stocks and shares or rents; they exclusively relate, in the rule solely applicable to Case I., to a trade and, in those applicable to Cases I. and II., to a trade, profession, employment or vocation. What then is the meaning of requiring the computation to be effected as directed in this manner? I cannot help thinking that for this purpose the receipt of income must be regarded as though it were a receipt from a trade, and that, consequently, in the first place it must be computed upon a fair and just average of the receipts of three years ending either on the day on which a company such as the present would make up its balance sheet or on April 5 preceding the year of assessment. It is said on behalf of the appellants that the only effect of the rule is to show that the accounts must be made up on April 5 preceding the year of assessment, but if this were the case it was already provided by s. 2 of the statute, and in the rule that phrase has only its full meaning when it is put as an alternative to the other method of making up the accounts. If, therefore, the other method of making up the accounts may also be brought into consideration, it then

becomes more clear that the receipt of income must be homologated with the profits of a trade, and if this step be reached, accepting the view that the Rules applicable to Cases I. and II. must also be introduced, there seems to me no reason why the computation of a first receipt should not be dealt with in the same way as that which is provided where the trade has been set up within the period of three years. The appellants have pointed out that, even if this be accomplished, the difficulty of knowing what is the equivalent, connected with the receipt of income, to the commencement of the trade is by no means clear. The Crown at one time in the course of the arguments thought it was the date of the acquisition of the investment from which the income was received, and, if this were so, a person or a company holding a block of investments would have to treat each one separately and might be called upon to make innumerable different returns. In the present case the difference between acquisition of the property and receipt of the income is immaterial, but my interpretation of the Act is, that it is the receipt of the income that must be taken as the equivalent of the setting up of the trade. I am far from professing confidence as to this interpretation of the statute. I feel, as Fry L.J. once said, that in this maze I have lost my way beyond recall by the guiding voice of my brethren, but I feel that the interpretation that I have given is the only one that can fairly give effect to the tax that is certainly imposed by the statute upon the receipt of such moneys. Bearing in mind that this House has decided that no assessment can be made in any year unless money is received in that year, a contrary construction would involve that, under the provisions of this Act, although it determined that receipts of moneys from foreign possessions should be taxed, a person who only became entitled to receive them at lapses of four years would escape taxation altogether, for, upon the appellants' hypothesis, he would not be liable for the first year and, on the decision of this House, he could not be assessed for the next three, seeing that therein he would receive no

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money. I have not overlooked the further argument of the appellants, that the forms provided for return contain no provision that would embrace a sum such as this received by a company for the first time within the first year of its life, but the Attorney-General pointed out similar omissions in other forms where the omitted matter was the clear subject of taxation, and even apart from this I think the mere incompleteness of a prescribed form is an uncertain guide to the construction of the statute to which it applies.

In the view that I have formed, the consideration of the question as to the effect of the subsequent statute does not become material, but the point has been dealt with by the Court of Appeal, and it is, therefore, not desirable that I should abstain from stating my opinion. I do not think that, in the circumstances of this case, the subsequent statute can properly be referred to for the purpose of interpreting the earlier. It is, of course, certain that Parliament can by statute declare the meaning of previous Acts. It would be competent for them to do so, even though their declaration offended the plain language of the earlier Act. It would be an unnecessary step to take, unless it were intended, contrary to the general principles of legislation, to make the explanatory Act retrospective, seeing that the subsequent statute could by independent enactment do what was desired. It is also possible that where Acts are to be read together, as they are in this case, a provision in an earlier Act that was so ambiguous that it was open to two perfectly clear and plain constructions could, by a subsequent incorporated statute, be interpreted so as to make the second statute effectual, which is what the Courts would desire to do, and it is also possible that, where a statute has created a crime or imposed a penalty, a subsequent Act showing that that crime was intended to have a limited interpretation or the circumstances regarded as narrow in which the penalty attached, would be used for the purpose of giving effect to the well known principle of construction to which I referred at an earlier stage. But I find myself unable to accept what Sargant L.J. said,

that the principles in certain cases are applicable to the construction of successive Acts of Parliament.

There are three cases to which he refers: *Skerratt* v. *Oakley* (1); *Darley* v. *Martin* (2); *Williamson* v. *Advocate-General.* (3) The first of these was a case where a mistake in the codicil was rectified by reference to the will, which if applied to statutes would mean that a later statute might be construed by the help of an earlier, a proposition to which there is no objection. The second was a case of an ambiguous expression in the will held to have one of two possible meanings by virtue of the codicil. And the third was a case of two Scotch testamentary dispositions which were read together, and thus made more plain what Lord Brougham thought was plain before. It is important to notice that all these cases deal with testamentary documents.

Now, there are several important distinctions between wills and codicils and successive Acts of Parliament. In the first place, however long the will has preceded the codicil, they both operate from the same moment, and, by the ordinary rules of construction, are construed together. In an Act of Parliament this is not so. The first Act will operate from its fixed date, so that its interpretation becomes at once a matter of necessity, and great unfairness may ensue if an interpretation which an Act of Parliament would fairly bear unaided by subsequent statutes was inferentially changed by other words in a subsequent Act. I find it difficult to assimilate the comparison between private individuals, who are masters of their own estate, and the claims of beneficiaries under their dispositions to the operations of a Legislature which apply equally to all His Majesty's subjects.

The case of *Attorney-General* v. *Clarkson* (4) does not really advance the respondent's argument, since there the earlier Act had been the subject of judicial decision and the second Act proceeded on the hypothesis that the decision was correct. As Lindley M.R. said, the later Act "adopts"

(1) (1798) 7 T. R. 492.
(2) (1853) 13 C. B. 683.
(3) (1843) 10 Cl. & F. 1, 17.
(4) [1900] 1 Q. B. 156, 163, 164, 165.

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the construction put upon the earlier, and in another sentence he says it "recognises" the construction. I find myself unable to agree with Sir F. H. Jeune when he says "the Legislature have acted as their own interpreters of the earlier Act." It is the function of the Courts to interpret and of the Legislature to enact.

The case of *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1) follows in effect the case of *Attorney-General* v. *Clarkson* (2), as is seen in the following passage from the judgment of Lord Sterndale: "I think it is clearly established in *Attorney-General* v. *Clarkson* (3) that subsequent legislation on the same subject may be looked to in order to see the proper construction to be put upon an earlier Act where that earlier Act is ambiguous. I quite agree that subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier." This is, in my opinion, an accurate expression of the law, if by "any ambiguity" is meant a phrase fairly and equally open to divers meanings, but in this case the difficulty is not due to ambiguity but to the application of rules suitable for one purpose to another for which they are wholly unfit. The only possible ambiguity is in considering whether the words "as directed in Case I." are specially limited to the solitary rule to which I have referred or to all rules applicable to Case I. This to my mind is not ambiguous, and there is no need to have recourse to the later statute for its interpretation.

But for the reasons I have given I think the appeal fails.

VISCOUNT SUMNER. My Lords, the appellant company carry on the business of an investment company, but nothing turns on this. They have been assessed as property owners—namely, as shareholders in a company incorporated

(1) [1921] 2 K. B. 403, 414. (2) [1900] 1 Q. B. 156, 163, 164, 165.
(3) [1900] 1 Q. B. 156.

and carrying on business in the United States—"in respect of income arising from . . . . shares . . . . in any place out of the United Kingdom" under Sch. D, Case V., r. 1. About seven months after incorporation the appellant company received 601,717*l.* as a dividend on this holding, and in respect of this one dividend they have been assessed in the sum of 859,596*l.* for the fiscal year 1922–23 and again in the sum of 1,031,372*l.* for the fiscal year 1923–24, being the assessments originally under appeal. These figures were arrived at by taking $\frac{10}{7}$ths of 601,717*l.*, ten months being the length of time from the company's incorporation in 1922 to the end of the fiscal year, and $\frac{12}{7}$ths for the following fiscal year, which was supposed to be the right method of computation where a trade has been set up and commenced in the year of assessment, owing to the words "according to an average of such a period, being greater or less than one year, as the case may require" within r. 2 of the Rules applicable to Case VI., to which reference is made in r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. The Crown did not maintain the claim for this mode of assessment, but, while still contending that the computation should be made according to r. 2 of the Rules applicable to Case VI., reduced the amounts, on which the assessment was to be made, to 601,717*l.* in each of the two years. It is not necessary to examine the higher assessments further. The lower assessments were arrived at by contending that r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. is, by r. 1 of the Rules applicable to Case V., part of the directions for the computation of tax on income arising from shares in a place out of the United Kingdom; that in the case of such shares the date of their acquisition corresponds to, and is impliedly directed to be used by, the words "when the trade has been set up within the said period of three years," and, therefore, that the computation was on 601,717*l.*, as the average for one year from the date of acquisition, which is the basis of taxation for the second period, and on the like sum for the first period, being the full amount arising in that period of assessment. Having

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succeeded in this revised contention before the Special Commissioners, the Inland Revenue failed before Rowlatt, J., who reduced the assessment to 200,572*l.* for the second year of assessment, 1923–24, when it first became possible to take an average of three years ending on April 5, 1923, within the Rule applicable to Case I., and discharged it in the first year, when no such average was possible. His judgment was reversed by the Court of Appeal.

My Lords, the whole question turns on the words "as directed in Case I." in r. 1 of the Rules applicable to Case V., and, in my opinion, directions, relevant to shares in a foreign company, are only to be found in the Rule applicable to Case I. Rule 1 of the Rules applicable to Cases I. and II. is no doubt a rule applicable to Case I., but it is limited to occasions where an average for one year can be computed from the first setting up and commencement of something, which is obviously itself the source of the profits or gains. In its express terms this rule applies to trading profits. The contention is that by analogy it can be applied to foreign shares, which are not in themselves stock in trade and the dividends of which are not trading profits. I cannot accept this. The analogy between the date of starting a trade, which is an aggregate of many operations, and the date, when an investor buys a stock to hold, is too remote to be applicable, and in any case the Crown does not tax by analogy but by statute, and there is nothing in the Act which says what is here contended for. It is said that singular results and even a loss of tax will occur on the appellants' contention, and that this cannot have been intended by the Legislature, but it is not for us to say, nor do we know, what the Legislature may or may not have meant, apart from their words, by which we are bound alike in what they say and in what they do not. Words which impose tax in general terms may still receive a particular limitation where the computation rules omit the directions appropriate and indispensable to levying the tax in the particular case.

An independent contention has been raised on the part of the Inland Revenue based on the new rule, which has

now been inserted (though not retrospectively) after r. 3 of the Rules applicable to Case V. of Sch. D, by s. 26 of the Finance Act, 1924, a provision which, by s. 41, is to be construed together with the Income Tax Acts. The matter is put in two ways: the first is that the provisions of the different rules, which I have discussed above, are ambiguous, and that in interpreting them it is therefore legitimate to see how subsequent legislation in pari materia has revealed the Legislature's view of their meaning; the second is that taxing Acts, passed from time to time, are analogous to a will and codicils, and that Acts, which are directed to be read together, are analogous to one long instrument, so that the Legislature's mind as to earlier passages may be revealed by considering how it is expressed in later passages. There is some authority for the analogy thus declared to exist, but I need only say that the analogy, if there is one, is not close, and the canon of interpretation, if it is sound, does not carry one much further. My answer, however, to the first proposition is, that the rules referred to are not ambiguous. What they say is clear. It is their results (I agree both ways) that seem puzzling and in some cases unexpected, but that only shows that the legislation is somewhat arbitrary, which sometimes cannot be helped, not that it is ambiguous, so that while the words are reasonably capable of two different meanings, there is no reason on the face of the Act why one should be more right than the other. The new rule itself no doubt assumes, that in fact there may be cases where, in respect of income from a foreign possession, a person may be charged with tax computed under r. 1 of the Rules applicable to Cases I. and II., and it directs, in such a case, that, if the events specified subsequently arise, he shall get relief, provided he asks for it within the appointed time. Let it be that this contemplates a legitimate application of the method of computation referred to and is not a mere provision for cases where the charge has been made unjustifiably, for then the money ought to be refunded without waiting for a claim to be made within a limited time. Still the case

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dealt with is only that of applying such a computation to foreign possessions, for which r. 2 of the Rules applicable to Case V. provides, and not to stocks and shares, which are dealt with in r. 1. Why a distinction should be made I do not know, but made it is, and this I think is sufficient ground for saying that the new rule cannot be regarded as imposing a non-natural construction on r. 1.

My Lords, I think the appeal should be allowed, and I move your Lordships accordingly.

LORD ATKINSON. My Lords, the facts have been fully stated already. It is unnecessary for me to repeat them further than to the extent needed to make my judgment intelligible.

The assessments impeached in this appeal are: (1.) that for the year ending April 5, 1923, amounting to 859,596*l.*, and (2.) that for the year ending April 5, 1924, in the sum of 1,031,372*l.*

These two assessments purport to have been made under and in accordance with the provisions of r. 1 of the Rules applicable to Case V. of Sch. D of the Income Tax Act of 1918.

That Rule runs as follows:—

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years, *as directed in Case I.*, whether the income has been or will be received in the United Kingdom or not, subject, in the case of income not received in the United Kingdom, to the same deductions and allowances as are provided in rule 1 of the Rules applicable to Case IV., and the provisions of this Act, including those relating to the delivery of statements, shall apply accordingly."

The first difficulty which confronts one in the construction of this rule is this—that it requires that the tax it imposes in respect of income arising from stocks and shares outside the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years "*as directed*

in Case I.," a Case which deals not with the income arising from stocks and shares wherever situated at all, but with trade profits and gains derived from trade by those who carry it on. This directing Rule, as one may style it, runs thus :—

"The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A, and shall be computed on the full amount of the balance of the profits and gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

It is quite obvious that the provisions touching the making up of the accounts of a trade are wholly inapplicable to the receipt by the appellants of their dividends on foreign securities. The alternative termination of the three years on which the average is to be taken—namely, April 5 preceding the year of assessment—may not be quite so inapplicable. Sect. 207 of the Income Tax Act of 1918 provides that the statements to be delivered by the persons or bodies bound to deliver them of the amount of the annual value of their profits on which any taxes are chargeable, are to be framed in accordance with the rules and directions contained in the Fifth Schedule of this Act. Sub-head VII. of this latter Schedule provides that for every person carrying on any trade to be charged under Sch. D the statement is to contain the amount of the profits or gains thereof on a fair and just average of the three preceding years, or of such shorter period as the trade shall have been carried on. . . .

It has been contended on behalf of the Crown that in construing r. 1 of the Rules applicable to Case V., Sch. D, the words "*as directed in Case I.*" should be read as if they ran "as directed by Rules applicable to Cases I. and II." This change if justifiable, which I hardly think it is, would not serve the purpose of the Crown, because these latter rules deal only with profits and gains derived from trades,

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professions, employments or vocations, and provide that where those sources of revenue have been set up and commenced within the period of three years mentioned in reference to which the computation is to be made of the average profits and gains for one year, that year is to run from this same "*setting up and commencement.*" It has been suggested on behalf of the Crown that the purchase of the foreign securities by the appellants may be taken to be the setting up and commencement of the trade, profession, employment or vocation mentioned in the aforesaid rules; to which it is objected by the appellants that the foreign securities might not have been acquired on one occasion but from time to time on unconnected occasions, separated perhaps by considerable intervals of time. It was suggested, as I understood, that this difficulty could be got over by treating the whole of the securities as a bundle all acquired at the same time. I do not think this is a possible mode of construing these rules. I think they are entirely inapplicable to the taxation of the sources of wealth from which the appellants' income is derived, and the acquisition by the appellants of those sources.

My Lords, when it is remembered that it is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so called equitable constructions of them are not permissible: *Partington* v. *Attorney-General* (1); *Gilbertson* v. *Fergusson* (2); *In re Micklethwait* (3); *Tennant* v. *Smith* (4), I am, for the reasons I have mentioned, unable to come to the conclusion that the different provisions of Sch. D of the Act of 1918, to which I have referred, clearly impose the burden of income tax on the appellants in respect of dividends they have received from their foreign securities.

(1) (1869) L. R. 4 H. L. 100, 122.
(2) (1881) 7 Q. B. D. 562.
(3) (1855) 11 Ex. 452, 456.
(4) [1892] A. C. 150.

The Master of the Rolls, as I read his judgment, came to the conclusion that, apart altogether from the alleged curative effect of s. 26 of the Finance Act of 1924, the provisions of the statute of 1918, which I have referred to, were in themselves sufficiently clear, plain and unambiguous to impose, according to established principles, income tax on the sum received by the appellants from their foreign possessions. If that be the Master of the Rolls' opinion, I am quite unable to concur with him in it. It has been contended, however, on the part of the Crown that, by s. 26 of the Finance Act of 1924, any mistake and any blunder which might have been committed in passing the provision of the statute of 1918, to which I have referred, or any ambiguity left as to the meaning of the language used, has been completely cured; and by it the provisions of the statute of 1918 have been rendered capable of imposing on the appellants the burden the Crown seek to have imposed upon them. Lawrence L.J. rests his decision to a great extent, if not indeed altogether, on the effect of this s. 26, while Sargant L.J. apparently admits that he has received great assistance from this section in solving the ambiguities and getting over the difficulties of interpretation presented by the provisions of the above mentioned r. 1 and also those presented by rules 1 and 2 applicable to the same Case. The Master of the Rolls does not apparently take a view so strong as those of his colleagues as to the effect of s. 26 in solving ambiguities, but, without admitting any need of assistance in the interpretation of the above mentioned Rules and Cases, he finds in this s. 26 a recognition and assertion of view he had already independently reached. It is, under those circumstances, imperatively necessary to examine in detail the provisions of s. 26 and the conditions under which, as established by authority, such a section as this can be held to be capable of affording the help needed.

The section begins by providing that the rule set out in the section and numbered 4 shall be added after r. 3 of the Rules applicable to Case V., Sch. D. The very first of these rules is one containing the embarrassing direction that "the

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computation therein mentioned is to be made on an average of three years, *as directed in Case I.*" The section does not purport to, of itself, impose a tax upon any person in respect of income derived from a possession out of the United Kingdom or to modify such a tax if already imposed. What it does purport to do is to secure redress for a person properly, i.e., lawfully, chargeable for income tax, that, if by the use of the methods mentioned he should be overcharged, he shall get the excess refunded to him. The function of which this section contemplates the discharge by the rule named is the computation of the amount of the tax which the person to whom the income from the foreign possession belongs has to pay, and not the imposition of that tax. Sargant L.J. seems to hold that a legislative interpretation of the statute of 1918 is to be found in this s. 26 of the Act of 1924, and, therefore, the case comes within a well recognized principle dealing with the construction of statutes —namely, that where the interpretation of a statute is obscure or ambiguous, or readily capable of more than one interpretation, light may be thrown on the true view to be taken of it by the aim and provisions of a subsequent statute. Many authorities have been cited by Mr. Maugham on behalf of the appellants on this point. He referred to Maxwell on Statutes. In *Dore* v. *Gray* (1) it was laid down that an Act of Parliament does not alter the law by merely betraying an erroneous opinion of it; but where it is gathered from a later Act that the Legislature attached a certain meaning to certain words in an earlier cognate Act this would be taken as a legislative declaration of its meaning. In the case of the *Earl of Shrewsbury* v. *Scott* (2), Cockburn C.J. said :—

"I quite concur in the argument that a mistake as to the state of the law on the part of the legislature in a private Act of Parliament—nay, I may say upon the authority of the case to which Mr. Grant, as amicus curiae, was good enough to direct our attention yesterday" [*Ex parte Lloyd* (3)] "even in a public Act—any legislation founded

(1) 2 T. R. 358. (2) 6 C. B. (N. S.) 1, 180.
(3) 1 Sim. N. S. 248.

on such mistake, would not have the effect of making that the law which the legislature had erroneously assumed to be so."

In *Attorney-General* v. *Wood* (1), Vaughan Williams J. in giving judgment is reported to have said :—

"I wish to add that I do not think that the fact that s. 14 of the Finance Act, 1896 (59 & 60 Vict. c. 28), contains an enactment in the sense of the construction which I am now putting on s. 5, sub-s. 3, of the Act of 1894 shows that that construction is wrong because, if it were right, the amending Act might be said to be useless. The amending Act may be merely declaratory to clear up doubts, and, even if not so intended, the presence of the section in the later Act cannot determine the construction of the earlier."

The case of *Attorney-General* v. *Clarkson* (2) was also cited on behalf of the appellants. It is an important case. It was according to the headnote decided that if property be contingently settled, settled estate duty is under s. 5, sub-s. 1 (*a*), of the Finance Act of 1894, payable upon it before the contemplated contingency arises, but that under s. 14 of the subsequent statute the Finance Act of 1898, if the contingency does not and cannot ever arise, the duty paid will be repaid, because this s. 14 of the Act of 1898 amounts to an adoption by the Legislature of the construction put upon s. 5, sub-s. 1 (*a*), of the Finance Act of 1894. Sect. 5, sub-s. 1, of this latter Act ran as follows :—

"Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passed under that disposition on the death of the deceased to some person not competent to dispose of the property,—(*a*) a further estate duty (called settlement estate duty) on the principal value of the settled property shall be levied at the rate herein-after specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased."

Sect. 14 of the Finance Act of 1898 runs thus :—

"Where in the case of a death occurring after the

(1) [1897] 2 Q. B. 102, 110. (2) [1900] 1 Q. B. 156, 164.

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commencement of this Act settlement estate duty is paid in respect of any property contingently settled, and it is thereafter shown that the contingency has not arisen, and cannot arise, the said duty paid in respect of such property shall be repaid."

Lindley M.R. (as he then was) in delivering judgment when referring to this s. 14 said: "Consider what that means. It affirms in substance the decision in *Attorney-General* v. *Fairley* (1), and proceeds upon the assumption that it was right. It adopts the construction put by it upon s. 5 and the sections of the Act of 1882 which are incorporated in the Act of 1894, and says in unmistakable language that the duty must be paid before it is known whether the contingency will or will not arise." There does not appear to me to be any relation between s. 26 of the statute of 1924 and the Income Tax Act of 1918, comparable in closeness to that between s. 14 of the Finance Act, 1898, and s. 5, sub-s. 1 (*a*), of the Finance Act of 1894.

In the case of *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (2) the case was also cited with approval.

I am quite unable to come to the conclusion at which the learned judges of the Court of Appeal arrived touching the effect of s. 26 of the Act of 1924. I am, therefore, of opinion that the appeal should be allowed with costs.

LORD WRENBURY. My Lords, Case I. and Case II. of Sch. D of the Income Tax Act, 1918, have to do with tax in respect of trade and of professions. Case V. has to do with tax in respect of income arising from foreign possessions. The one may be described as tax upon earned income, the other as tax upon unearned income arising from foreign possessions. The one is tax upon a trader, the other is tax upon an investor. Upon this appeal your Lordships are concerned with tax under Case V. The appellants are an investment company. They were incorporated on June 7, 1922, and in August, 1922, acquired as an investment a large holding of shares in an American company called Joseph

(1) [1897] 1 Q. B. 698. (2) [1921] 2 K. B. 403.

Benn & Sons. On December 7, 1922, they received a sum of 601,717*l.* as a dividend on these shares. During the financial year 1922–23 they received no further dividend on these shares, nor any other income from possessions out of the United Kingdom. The question to be decided is as to the amount of the assessment to be made for the financial years 1922–23 and 1923–24.

The relevant Rule in Sch. D is No. 1 of the Rules applicable to Case V. That Rule requires that the tax shall be computed on "an average of the three preceding years as directed in Case I." From the Rule relating to Case I. I find that the three years are "three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade" [for this rule is addressed to the case of trade] "have been usually made up or on the 5th day of April preceding the year of assessment."

The rule to which I have last referred is qualified by r. 1, sub-r. 2, of the "Rules applicable to Cases I. and II." We have heard an argument as to whether this qualification is imported as to Case V. by the words in the Rules applicable to Case V. "three preceding years as directed in Case I." In my opinion it is, but for the present purpose it is immaterial whether it is or not. And for this reason. The qualification in question is addressed only to the case of a trade, and is governed by the date at which the trade was commenced. The present case is one of investment. There is no provision that in the case of an investment the date of acquisition of the investment or any other date shall be taken as the equivalent of the commencement of the trade. Rule 1, sub-r. 2, of the "Rules applicable to Cases I. and II." has in my opinion no application to the case of an investment. This rules out in the case of the investor the introduction of the reference made in that rule to the Rule applicable to Case VI.

We have heard a further argument as to whether s. 26 of the Finance Act, 1924, is to be regarded as throwing light upon the construction of the Act of 1918. My Lords, in my opinion an Act of 1924 passed on August 1, 1924, which is

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not expressed to be retrospective and does not directly or inferentially purport to put a construction upon a previous Act can have no bearing upon a question arising upon events which happened in 1922 and as to which the last relevant date is April 5, 1924.

It results that for the present purpose your Lordships are concerned only with "Rules applicable to Case V." and "Case I., Rule applicable to Case I."

I need not read the last mentioned rule again. Applying its language to the facts of this case it provides that for the financial year 1922–23 the tax shall be computed on the full amount of the profits of the investment upon a fair and just average of three years ending April 5, 1922. The profits must be the profits accruing to the person taxed; they cannot include the profits, if any, accruing to his predecessor in title as holder of the shares. For the year 1922–23 therefore I must take three years before April, 1922, and note that the taxpayer received nothing in those three years. He must therefore be assessed at nil for the year 1922–23.

Then as to the year 1923–24 the taxpayer received 601,717*l.* in December, 1922 (that is to say in one of the three relevant years), and nothing in the other two. He must be assessed therefore upon one-third of 601,717*l.*, and no more.

I am fully conscious of the fact that if this is the true construction of the Act the following consequence ensues. If A. buys a foreign share say in the financial year 1922–23 and sells it to B. at the end of that year after receiving a dividend upon it he pays no tax. If B., the purchaser from him, follows A.'s example and sells before the end of the year in which he bought the share he pays no tax, and so with every subsequent holder. But I cannot strain the Act for the purpose of creating a liability to tax which the Act has not imposed by plain or, as I think, by any words. The fact is that by creating the liability of the investor in foreign shares by words of reference to a rule which is addressed to the case of a trade the Act has become involved in a confusion in which the Legislature has not observed that in some circumstances it has let the investor in foreign shares go free.

I find myself quite unable to support the assessment made by the Special Commissioners and upheld by the Court of Appeal—namely, 601,717*l.* (the full amount of the dividend) for the year 1922–23 and again the full sum of 601,717*l.* for the year 1923–24. This appeal must in my opinion be allowed and those assessments discharged, and there must be substituted an assessment of nil for 1922–23 and 200,572*l.* 6*s.* 8*d.* for the year 1923–24. The appellants must I think have repayment of the costs they have been ordered to pay and must have their costs here and below.

LORD WARRINGTON OF CLYFFE. My Lords, the question in this case is as to the mode in which the tax on certain income of the appellants representing a dividend of a foreign company ought to be computed under r. 1 of the Rules applicable to Case V. of Sch. D of the Income Tax Act, 1918, and turns on the true construction of that rule.

The result of the respondent's contention upheld in the Court below is somewhat startling, for under it the appellants have in two successive years of assessment been assessed in the full amount of a dividend received in the first of those years, which is thus taxed twice over.

The years of assessment in question are the years 1922–23 and 1923–24.

The appellant company was incorporated in June, 1922, under the Companies (Consolidation) Act, 1908. It carries on business as an investment company.

In August, 1922, the company acquired a large interest in Joseph Benn & Sons, a company incorporated in the United States of America. In December, 1922, the company received a dividend of 601,717*l.* on its shares in the American company. It received no further dividend or income from this or any other foreign possession during the year ending April 5, 1923.

The Commissioners of Inland Revenue, purporting to act under Rules hereinafter mentioned, assessed the appellants for the year 1922–23 in respect of the above mentioned sum at the sum of 859,596*l.*, treating the 601,717*l.* as the earnings

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for seven months out of a business year of ten months, dividing it by 7 and multiplying the result by 10. For the year 1923–24, which was a full business year of twelve months, they multiplied $\frac{1}{7}$th of the same 601,717*l.* by 12 and assessed the appellants at 1,031,372*l.*

The company appealed to the Special Commissioners, who reduced the assessment for each year to 601,717*l.*, but held that with this variation the assessment should be confirmed. The Commissioners stated a case for the opinion of the Court, and by an order of Rowlatt J. dated November 24, 1926, the assessment was discharged as to the year 1922–23 and reduced to 200,572*l.* as to the year 1923–24. This order was on February 2, 1927, reversed by the Court of Appeal, who restored the assessment made by the Special Commissioners for each of the two years in question.

The question turns on the true construction of r. 1 of the Rules applicable to Case V. It is in the following terms :—

"The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom shall be computed on the full amount thereof on an average of the three preceding years as directed in Case I." . . . . The remainder of the rule is immaterial.

The only rule applicable to Case I. in which a direction as to an average of three years is given is the following :—

"*Rule applicable to Case I.*—The tax shall extend to every trade carried on in the United Kingdom or elsewhere . . . . and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the 5th April preceding the year of assessment."

A similar Rule is applicable to Case II., except that the three years are referred to as "ending as in Case I."

So far there is in my opinion little difficulty in arriving at the true construction of the r. 1 applicable to Case V. It is dealing with income arising from stocks, etc., and directs that the tax is to be computed on an average of the three

preceding years. If the Rule had stopped there, there might have been a question what years were meant—were they the preceding years in which a dividend had been received, or were they calendar years, or years of assessment? This question is settled by the words "as directed in Case I." The preceding years are there defined as ending on one of two alternative days, and, as there is under Case V. no trade in question, the second alternative is alone appropriate, and the three preceding years are those ending April 5 preceding the year of assessment.

It is true that applying the rule thus interpreted to the present case, no income having been received in any one of the three years preceding the first of the two years of assessment, the assessment for that year would be nil, but in the next year, inasmuch as in the year immediately preceding there was a sum of 601,717*l.*, the assessment would be one-third of that sum—namely, 200,572*l.*, the amount fixed by the order of Rowlatt J.—and so on in succeeding years, taking into account any further profits received.

But the respondent says there is another "direction in Case I." referred to in the Rule applicable to Case V.—namely, r. 1, sub-r. 2, of the Rules applicable to Cases I. and II. "Where the trade, profession, employment or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the Rules applicable to Case VI."

The material rule applicable to Case VI. is r. 2: "The computation shall be made, either on the full amount of the profits or gains arising in the year of assessment, or according to an average of such period, being greater or less than one year as the case may require, or as may be directed by the Commissioners."

It is on the view that these provisions apply to Case V. that the Special Commissioners and the Court of Appeal have proceeded.

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I cannot, with all respect, adopt their view. I am not affected by the fact that the rule in dispute is applicable to Case II. as well as to Case I. What does impress me is that the rule refers only to a trade, profession, employment or vocation and gives directions for computation depending on the time when the trade, etc., was set up or commenced, and there are no directions for making the very considerable changes necessary if it is to apply to dividends on securities.

The Commissioners and the Court of Appeal have assumed that the acquisition of the securities is the equivalent date, but this is a mere assumption and not justified by anything in the Act of Parliament. Moreover, if the securities were acquired at different dates there would be extraordinary complications in the application of the Rule under Case VI.

The same expression as in r. 1 of the Rules under Case V. "as directed in Case I." is used in r. 2 under Case V., under which it would be, if anything, still more difficult so to mould the rule in dispute as to make it workable.

Moreover the rule gives no directions for computation on an average of three years, but on certain other averages substituted in certain events for that of three years.

A further point was made by the respondent founded on s. 26 of the Finance Act, 1924. It was said that the effect of this section is to declare that the construction of the Income Tax Act for which the Crown now contends is and always has been the true construction. Much reliance was placed on this point by Sargant L.J., but with all respect to that learned judge I cannot concur in his view. The section does not contain any such declaration express or implied. It merely assumes that persons may have paid tax computed in accordance with r. 1 of the Rules applicable to Cases I. and II. of Sch. D, and gives those persons the relief mentioned in the section. It says nothing about the legality or otherwise of such computation. To read the section as amounting to a retrospective declaration as to the true construction of the previous Act seems to me to give it an effect which it will not bear.

For these reasons I am of opinion that this appeal ought

to be allowed with costs here and below and the order of Rowlatt J. restored. H. L. (E.) 1928 ORMOND INVESTMENT CO. v. BETTS.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondent to repay to the appellants the sums of 150,429*l.* 5*s.* *and* 8813*l.* 1*s.* 7*d.*, *together with interest at the rate of* 4½ *per cent. on the said sum of* 150,429*l.* 5*s.* *from March* 3, 1927, *until the date of repayment. The respondent to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.*

Lords' Journals, Feb. 24, 1928.

Solicitors for the appellants: *Bell, Brodrick & Gray, for Jonathan Knowles & Cox, Bradford.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

[PRIVY COUNCIL.]

ARSECULERATNE . . . . . APPELLANT; AND PERERA . . . . . RESPONDENT. J. C.* 1927 Dec. 6.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Partnership Agreement—Agreement affecting Land—Absence of Attestation—Suit not affecting Land—Validity of Agreement—Ordinance VII. of 1840, *ss.* 2, 21, 22.

The appellant and respondent agreed in writing to work a mine in partnership, it being provided that the respondent should transfer a lease of the mine to the partnership, that the appellant should manage the work and receive commission, and that they should contribute equally to the expenses, and share the profit and loss. The agreement was signed by the parties, but not attested by a notary or witnesses. Work was carried on for nearly four years unprofitably, and then abandoned. The appellant sued the respondent, claiming a dissolution of partnership, and money due to him for commission and expenses incurred.

Ordinance VII. of 1840 provides by s. 2 that no agreement for the sale, transfer or mortgage of land "shall be of force or avail in law"

* *Present:* VISCOUNT CAVE L.C., LORD CARSON, and LORD DARLING.

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unless it is in writing, signed, and attested by a notary and two witnesses; by s. 21 that no agreement of partnership "shall be of force or avail in law" unless it is in writing and signed; by s. 22 that nothing in s. 21 is to exempt any instrument affecting land from being executed and attested as required by s. 2:—

Held, that the agreement not being attested as required by s. 2 of the Ordinance was void as an agreement to transfer the lease, the wording of the section preventing that defect from being cured by any principle of law or equity; but that, as the agreement complied with s. 21, it could be referred to for the purpose of proving the other terms of the partnership, which alone were relevant to the suit; and that there should be an order for an account and payment.

Pate v. *Pate* [1915] A. C. 1100 distinguished.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 27 of 1927) from a judgment of the Supreme Court of Ceylon (July 29, 1926) affirming a judgment of the District Court of Colombo.

The appellant brought a suit in the District Court against the respondent, claiming dissolution of a partnership, payment of a half share of expenses incurred in carrying on the partnership business, and commission.

The question arising upon the appeal was whether the terms of the partnership were capable of proof having regard to the provisions of Ceylon Ordinance VII. of 1840.

The facts and the material terms of the Ordinance appear from the judgment of the Judicial Committee.

The District Judge held that the agreement of partnership being unattested, was void, and dismissed the suit. An appeal to the Supreme Court (Garvin A.C.J. and Dalton J.) was dismissed on grounds which appear from the present judgment.

1927. Oct. 18. *Owen Thompson K.C.* and *Hallett* for the appellant. The appellant is entitled to an account and payment. The fact of the partnership, and sufficient of its terms, were admitted on the pleadings. Secondly, s. 2 did not make the agreement void; the absence of attestation was cured on the equitable principles applied in *Forster* v. *Hale* (1); and *Dale* v. *Hamilton*. (2) [Reference was made also to *In re De Nicols* (3); *Harburg India Rubber Comb*

(1) (1798) 3 Ves. 696; on app. (1800) 5 Ves. 308.
(2) (1846) 5 Hare, 369; on app. (1847) 2 Ph. 266.
(3) [1900] 2 Ch. 410.

Co. v. *Martin.* (1)] Thirdly, under s. 21 the agreement was valid as a partnership agreement, and as no question with regard to the lease arose in the suit, s. 22 did not make s. 2 apply. Fourthly, the parties having carried out the terms of the agreement, the plaintiff is entitled in equity to enforce obligations which arose in so doing, on the principle recognized in *Maddison* v. *Alderson.* (2)

du Parcq K.C. and *Bischoff* for the respondent. The admission in the pleadings did not show the terms of partnership sufficiently to support the suit. An admission on pleadings cannot satisfy the terms of s. 2. Having regard to the language of that section, a failure to comply with its provisions cannot be cured on the principles applied in the cases relied on. Those cases depended on their particular facts, and the defect was under the Statute of Frauds, which is different in effect. In *Pate* v. *Pate* (3) the Board held that s. 21 precluded proof of a partnership carried on for several years under a verbal agreement. The disenabling words of s. 2 and of s. 21 are the same. The suit itself affected land because it was necessary to determine in whom the lease vested upon a dissolution. The suit was not one in which the relief sought could be based solely on the res gestae, apart from the agreed terms: *Maddison* v. *Alderson* (4); *Lawford* v. *Billericay Rural Council.* (5)

Owen Thompson K.C. replied.

Dec. 6. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This is an appeal from a decree of the Supreme Court of Ceylon affirming a decree of the District Court of Colombo in an action in which the appellant was plaintiff and the respondent was defendant.

By an agreement in writing dated December 21, 1915, the respondent and the appellant agreed to prospect for plumbago at the Pattagoda Mines under the name of the Pattagoda Mining Company. The agreement provided that

(1) [1902] 1 K. B. 778.
(2) (1883) 8 App. Cas. 467.
(3) [1915] A. C. 1100.
(4) 8 App. Cas. 467, 475.
(5) [1903] 1 K. B. 772, 786.

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the respondent "would thereby give over" his interest in the lease which he had taken from the owners of the mine (which had still eight years to run) to the company; that the appellant should manage the mine and receive a commission of 2½ per cent. on all transactions; that the partners should contribute equally to the expenses to be incurred on the pit or pits; and that they should be entitled to the profits and liable for the losses in equal shares. The agreement was signed by both parties, but the signatures were not attested by a notary or witnesses. The mine was duly worked under the management of the appellant from the date of the agreement until the month of January, 1918, when the working was stopped by mutual arrangement.

On January 25, 1923, the appellant brought this action against the respondent pleading the above facts and alleging that he (the appellant) had paid or borrowed moneys in respect of the business amounting to Rs.72,857 and was entitled to commission amounting to a further Rs.1504; and the plaintiff claimed a dissolution of the partnership and payment by the defendant of one-half of those sums or of such sum as might be found due upon an account being taken. The respondent by his written statement admitted that he had agreed to work the Pattagoda plumbago pits under the name of the Pattagoda Mining Company, that the profits and losses were to be divided equally, that the plaintiff was to manage the business for a commission of 2½ per cent., and that the business had been carried on as alleged; but he pleaded that the agreement of December 21, 1915, on which the plaintiff's action was based, was invalid in law.

Issues were framed, which included the following: 1. Is the document containing the agreement between plaintiff and defendant invalid in law inasmuch as it has not been notarially executed and has not been duly stamped? . . . . 5. Had plaintiff authority to borrow money for the working of the partnership? 6. Is defendant liable to pay half share of any of the monies borrowed by the plaintiff or of the interest due on such loans? . . . . 8. What sum, if any, is due by defendant to plaintiff or by plaintiff to defendant?

On the trial of the action the District Judge held on the first issue that the agreement of December 21, 1915, not having been attested by a notary and two witnesses in manner directed by cl. 2 of Ordinance No. VII. of 1840, was void in law, and without dealing with the other issues dismissed the action with costs. On an appeal by the plaintiff to the Supreme Court of Ceylon, that Court affirmed the judgment of the District Judge, and it is against that decision that the present appeal is brought.

The material provisions of Ordinance No. 7 of 1840 are as follows :—

" 2. No sale purchase transfer or mortgage of land or other immovable property and no promise bargain contract or agreement for effecting any such object or for establishing any security interest or incumbrance affecting land or other immovable property (other than a lease at will or for any period not exceeding one month) nor any contract or agreement for the future sale or purchase of any land or other immovable property shall be of force or avail in law unless the same shall be in writing and signed by the party making the same or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time and unless the execution of such writing deed or instrument be duly attested by such notary and witnesses."

" 21. No promise contract bargain or agreement unless it be in writing and signed by the party making the same or by some person thereto lawfully authorized by him or her shall be of force or avail in law for any of the following purposes : . . . . (4.) For establishing a partnership where the capital exceeds 100*l*. ; provided that this shall not be construed to prevent third parties from suing partners or persons acting as such and offering in evidence circumstances to prove a partnership existing between such persons or to exclude parol testimony concerning transactions by or the settlement of any account between partners.

" 22. Provided always that nothing in the preceding clause shall be construed to exempt any deed or instrument

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in any manner affecting land or other immovable property from being required for that purpose to be executed and attested in manner declared by the second clause of this Ordinance."

Applying these provisions, the Supreme Court held that the agreement of December 21, 1918, not having been executed and attested in manner required by the second clause of the Ordinance, was void so far as it purported to affect the lease of the Pattagoda Mines vested in the respondent; and after a careful examination of the cases of *Forster* v. *Hale* (1) and *Dale* v. *Hamilton* (2), they decided that the defect in the agreement was not cured, either by the principle laid down in those cases, or by the equitable doctrine of part performance. They further held that the agreement was one and indivisible, and that, the stipulation as to the transfer of the mine to the Pattagoda Company being ineffective, the whole agreement was void and of no effect; and accordingly that the action was rightly dismissed.

Upon the first of the two points so decided by the Supreme Court their Lordships are wholly in agreement with the opinion of that Court. The effect of cl. 21 of the Ordinance was considered by this Board in the case of *Pate* v. *Pate* (3), where it was held that no suit could be maintained in Ceylon upon an agreement for a partnership which was not in writing, signed by the parties as required by that section, even though the partnership business had been carried on for a time and had then been dissolved, and although the plaintiff was only claiming an account of the transactions of the dissolved partnership and payment of what might be found due. Doubtless the decision applies with equal force to an agreement affecting land which has not been executed and attested in manner required by cl. 2 of the Ordinance; and their Lordships agree with the opinion of the learned judges of the Supreme Court that in the case of such an agreement the operation of the Ordinance cannot be avoided either by an application of the principle of the decision in *Forster* v. *Hale* (1), or under the equitable doctrine of part

(1) 3 Ves. 696; 5 Ves. 308. (2) 5 Hare, 369; 2 Ph. 266.
(3) [1915] A. C. 1100.

performance. Both the case last cited and the doctrine of part performance have reference to s. 4 of the English Statute of Frauds, and they have no application to the more stringent provisions of cl. 2 of the Ordinance by which an agreement as to land not duly attested by a notary and two witnesses is rendered of no "force or avail in law."

But this does not conclude the matter. Assuming that the agreement by the respondent to "give over" the lease of the mine to the proposed company was void for want of proper attestation under cl. 2 of the Ordinance, the question remains whether a partnership between the parties is established. In this connection it is to be remembered that the respondent by his pleading admits the existence of a partnership, an admission which would appear to entitle the appellant to an order for an account. But it would not be satisfactory to decide the case on that ground alone, as the terms of the partnership as admitted by the respondent differ in some respects from those alleged in the plaint; and it is necessary to consider whether the agreement of December, 1915, although ineffective to pass any interest in the land, may yet be referred to as showing the other terms of the partnership. In their Lordships' opinion it may be so referred to. Clause 21 of the Ordinance requires that an agreement for a partnership where the capital exceeds 100*l.* shall be in writing signed by or on behalf of the parties; and the agreement of December, 1915, complies with that requirement. Clause 22 adds the proviso that an instrument affecting land shall "for that purpose" be executed and attested as required by cl. 2, an expression which leads to the inference that the instrument, although not notarially executed and attested, may yet be referred to for the purpose of establishing the other terms of the contract. It is true that in the present case the agreement to transfer the mine was an important term of the contract; and it may well be that if, during the currency of the lease, the plaintiff had sought to compel the defendant to put the mine at the disposal of the company and the defendant had refused so to do, the substratum of the partnership would have

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disappeared and the partnership must have been dissolved. But no such claim was ever made or is now made in this suit. It is possible, as Lord Loughborough pointed out in *Forster* v. *Hale* (1), for a mining business to be carried on in land in which no estate is given to those who share in the working; and in the present case it must be inferred that throughout the duration of the partnership the mine was worked by the licence of the respondent, which he did not choose to revoke. The partnership has now run its course, without the necessity for calling for a transfer of the lease, and all that is claimed is an account of the partnership transactions and payment of what may be found due. The partnership, apart from any claim to the land, is established by the written agreement and the admissions in the pleadings. If the venture had proved successful, and substantial profits had come to the plaintiff's hands, he would assuredly have been bound to account for them; and there is no reason why, now that the business has resulted in a loss, the plaintiff, who is alleged to have borne the whole expenses of the mining operations, should be left to bear that loss alone. He is entitled to an account on the footing of the agreement and to payment by the defendant of what may be found due on the taking of such account.

For these reasons their Lordships are of opinion that the judgment of the Supreme Court should be set aside, and that upon the first issue it should be declared that the agreement of December 21, 1915, is valid for the purpose of establishing a partnership between the parties, but not for the purpose of affecting the ownership of the mine, and the case should be remitted to the District Court to be dealt with upon the above footing, and their Lordships will humbly advise His Majesty accordingly. The respondent will pay the costs of the appeal to the Supreme Court and to this Board, the costs of the suit being reserved to be dealt with by the District Judge.

Solicitor for appellant: *O. A. Caley.*

Solicitors for respondent: *Freeman & Cooke.*

(1) 5 Ves. 308, 313.

[PRIVY COUNCIL.]

HONG KONG AND SHANGHAI BANKING CORPORATION . . . . . } APPELLANTS ;

AND

LO LEE SHI . . . . . RESPONDENT.

J. C.* 1928 Jan. 19.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Bankers—Banknote—Accidental Mutilation of Note—Note reconstructed from Fragments—Absence of Number of Note—Liability of Bank—Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 64.

A banknote issued by the appellants in Hong Kong, payable to bearer on demand, was accidentally mutilated. The bank declined to pay on presentation of a document which was proved at the trial to have been patched together from the fragments. This document, though it did not show the number of the note, showed clearly its other main features :—

Held, that as the identity of the document as a note of the bank was established, and it contained all the elements necessary to render it valid and effectual as a negotiable instrument, the bank was liable to pay the holder.

Bills of Exchange Act, 1882, s. 64 (reproduced in s. 64 of the Hong Kong Bills of Exchange Ordinance, 1885) does not apply to an alteration accidentally made in a bill.

Suffell v. *Bank of England* (1882) 9 Q. B. D. 555 distinguished.

Judgment of the Supreme Court of Hong Kong affirmed.

APPEAL (No. 104 of 1927) from a judgment of the Full Court of the Supreme Court of Hong Kong (February 7, 1927) affirming a judgment of Wood J.

The question at issue was the liability of the appellant bank to pay the sum named in a banknote issued by them, and payable to bearer on demand, on presentation of a document proved at the trial to have been constructed from the fragments of the note after its accidental partial destruction.

The facts appear from the judgment of the Judicial Committee.

* *Present :* LORD BUCKMASTER, LORD BLANESBURGH, and LORD DARLING.

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The trial judge (Wood J.) gave judgment for the plaintiff. An appeal to the Full Court was dismissed upon an equal division of opinion, Gollan C.J. being for allowing the appeal, and Wood J. (the trial judge) being for dismissing it.

1927. Dec. 12. *Jowitt K.C.* and *J. Forster* for the appellants.

The respondent did not appear.

1928. Jan. 19. The judgment of their Lordships was delivered by

LORD BUCKMASTER. Their Lordships notice with approval that this case has been brought before them for consideration within twelve months of its first hearing before the puisne judge in Hong Kong. They wish that this example of expedition was widely known and imitated.

The point that arises for decision is singularly free from authority, but fortunately the facts are beyond dispute. The appellants are the Hong Kong and Shanghai Banking Corporation, who carry on the business of banking in Hong Kong. In the course of their business they issue bank-notes for various sums; such notes are not legal currency but, owing to the high credit of the appellants, they are used as if they were. The bank is under liability to the Government of Hong Kong to deposit dollars as against all notes issued over a certain amount, and a tax is payable at the rate of 1 per cent. per annum on the value of notes in circulation. Apart from these conditions, which it may be assumed would apply to every bank in Hong Kong, the appellants have no special relationship with the Government at all. The notes they issue are in the ordinary form of a banknote. The name of the bank is at the head, the amount of the note is written in figures in the right and left hand corners. In the middle of the document the number of the note appears in two places on the same line, one on each side; below this there comes the promise to pay the bearer on demand at the office of the bank the amount of dollars, stated in words, for which the note is issued. Underneath this promise the

value of the note appears again in large light letters, over which is written "Hong Kong" followed by a date, and then "by order of the board of directors" with the signature of the chief accountant and the chief manager.

Lo Lee Shi, who is the respondent in this appeal, was given by her husband two of such notes, each for five hundred dollars. She placed them in the pocket of some garment, and then, having forgotten their hiding place, she washed, dried and starched the garment, and was proceeding to iron it when she found a wad of paper in the pocket; this upon extraction proved to be the remains of the two banknotes which, together with the coat, had been subjected to all the above processes. Considerable effort was made, with the help of the bank, to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success, and the note was accordingly paid. The full restoration of the other was more difficult; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain—the name of the bank, the amount of the note, the definite promise to pay the "bearer" on demand at the appellants' office, and the signatures by the chief accountant and the chief manager were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing, and Lo Lee Shi accordingly brought an action against them upon the note.

The judge on the trial of the action found in favour of the plaintiff. On appeal to the Full Court the judges were divided, the Chief Justice being in favour of the defence and the trial judge, who formed the other member of the Court, affirmed his own judgment. The bank, anxious to know their true legal position with regard to a note whose number was defaced, brought this appeal, but the respondent, deterred no doubt by fear of cost, has not appeared. The case has, however, been fully and carefully placed before the Board, who see no reason to think that any relevant matter escaped their attention.

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The real point of controversy is this. In the circumstances above stated are the appellants liable on a note whose number has been accidentally defaced? The case to which most consideration was given both in the earlier Courts and in argument on the appeal was *Suffell* v. *Bank of England* (1), but their Lordships think that apart from certain dicta the actual decision is of little assistance. In that case certain Bank of England notes had been intentionally and fraudulently altered by changing a five in the numbers to a three. After this alteration the notes having come into the hands of a perfectly innocent holder, he presented them for payment to the bank, who refused to honour them on the ground that the change in the number effected a material alteration in the document by virtue of which their liability was discharged. The action was brought upon the notes. The Court of Appeal decided in favour of the bank, but the grounds of their decision were these: first, that according to old and indisputable law the alteration of a deed in a material respect avoided the document; secondly, that this doctrine had become extended to ordinary written documents and was applicable to bills of exchange and promissory notes; and thirdly, that upon a Bank of England note, which the bank was bound to issue against bullion and which by law was currency, the alteration of the number was a material alteration.

The authority for the first two of these propositions needs no further investigation; for those interested in the subject the history of the principles will be found fully examined in the judgments of the learned judges in the case referred to, but since the date of that decision the law has been summarized in s. 64 of the Bills of Exchange Act, 1882, whose terms are literally reproduced for Hong Kong in the Bills of Exchange Ordinance, 1885, s. 64, in the following terms:—

"Alteration of bill.

"64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made,

(1) 9 Q. B. D. 555.

authorised, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor.

"(2.) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to alterations effected by the will of the person by whom or under whose directions they are made, and that it does not apply to a change due to pure accident.

The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has "himself made, authorised, or assented," to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent.

The case of *Davidson* v. *Cooper* (1) emphasizes the point, since there Lord Denman states that the party who may suffer if a document is avoided by alteration has no right to complain, since there cannot be any alteration except through fraud or laches on his part, meaning a fraudulent alteration, effected by the party or carelessness permitting it to be effected by another. It is not on that section that the solution to this difficulty is to be found, and yet it is upon the authority of the case which depended on this law that the learned Chief Justice bases his judgment, holding

(1) (1844) 13 M. & W. 343.

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that the accidental obliteration of the number was an alteration within the meaning of the section, and that the case quoted showed that such alteration was material.

It is therefore necessary to determine this case apart from the Ordinance, and in this connection their Lordships do not think the question of negligence plays any part. The right of a party to sue on the note in the event of its being defaced by fire or attacked by a mouse cannot depend upon whether it had been placed in a fire proof or a mouse proof safe or left in an ordinary box. When once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence, though that question does not now arise. In the first instance therefore it is essential to investigate whether there is sufficient of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent this must depend upon verbal evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must of course be shown to be parts of one and the same instrument. In this case every one of these conditions has been satisfied. It is indeed not denied that the pieces are pieces of one of the appellants' notes, nor is it, or could it be, suggested that the missing particles could be used in building up another note. It is the absence of the number on which the appellants rely, and this is no part of the operative portion of a bill of exchange or promissory note, although its alteration was held to be material in the case of a Bank of England note, owing to its special features: see *Suffell's* case (1), Jessel M.R. and Cotton L.J. Alteration, within the meaning of the statute, is not what has taken place here—and apart from this, it is difficult to see what has destroyed the liability of the bank upon a document admitted to be one of their notes. Brett L.J., in that case, states (2) that the number even of

(1) 9 Q. B. D. 555, 563, 575. (2) 9 Q. B. D. 566, 568.

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a Bank of England note is no part of the contract, and its alteration does not affect the contract, and Cotton L.J. (1) appears to take the same view, though Jessel M.R. leaves the question open. In their Lordships' opinion the contract here has never been altered, and is sufficiently evidenced by the mutilated document and the verbal testimony.

Their Lordships do not think that beyond their decision as to the meaning of the Ordinance it is possible in this case to lay down any general principles of law; they desire their judgment to be limited to this point, that in the special circumstances of this case it is possible, by means of the fragments of the document assisted by verbal evidence, to establish a claim against the bank for the 500 dollars due upon the note, and that accordingly this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Stephenson, Harwood & Tatham.*

[PRIVY COUNCIL.]

J. C.*
1928
Jan. 19.

ROYAL BANK OF CANADA AND ANOTHER APPELLANTS;

AND

LARUE AND OTHERS . . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR CANADA . INTERVENER.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority—Bankruptcy—Judicial Hypothec—Civil Code (Quebec), art. 2121—*Bankruptcy Act Amendment Act,* 1920 (10 & 11 *Geo.* 5, *c.* 34, *Dom.*), *s.* 6—*British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 91, *head* 21.

On the true construction of the Bankruptcy Act of Canada, s. 11, sub-s. 10 (enacted by c. 34 of the Dominion Statutes for 1920, s. 6), a judicial hypothec upon real assets of a debtor, resulting from registration under art. 2121 of the Civil Code of Quebec, was thereby postponed to an authorized assignment subsequently made by the debtor for the benefit of his creditors.

It was within the powers of the Parliament of Canada so to enact, since the legislative power of that Parliament under s. 91, head 21, of

* *Present:* VISCOUNT CAVE L.C., LORD BUCKMASTER, LORD CARSON, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

(1) 9 Q. B. D. 574.

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the British North America Act, 1867, in relation to "bankruptcy and insolvency," enables it to determine by legislation the relative priorities of creditors under a bankruptcy or authorized assignment; that power prevails over the legislative power of a Province under s. 92, head 2, in relation to property and civil rights in the Province.

Attorney-General of Ontario v. *Attorney-General for Canada* [1894] A. C. 189 followed.

Judgment of the Supreme Court [1926] S. C. R. 218 affirmed.

APPEAL (No. 28 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 2, 1926) reversing a judgment of the Court of King's Bench of the Province of Quebec, Appeal Side (June 15, 1925), which affirmed a judgment of the Superior Court.

The Bankruptcy Act of Canada by s. 11, sub-s. 10 (as enacted by s. 6 of the amending Act, c. 34 of 1920), provided that, from and after registration, a receiving order or authorized assignment made in pursuance of the Act "shall have precedence of all certificates of judgments, judgments operating as hypothecs. . . . ."

Two questions arose for determination in the appeal—namely, (1.) whether upon the true construction of the above sub-section a judicial hypothec upon real estate of a debtor, resulting from the registration of a notice under art. 2121 of the Civil Code of Quebec, was intended to be postponed to a subsequent authorized assignment by the debtor for the benefit of his creditors, and (2.)—if that were the intended effect—whether the sub-section was in that respect within the legislative authority of the Dominion Parliament under the British North America Act, 1867.

The facts and the relevant statutory provisions appear from the judgment of the Judicial Committee.

In the Superior Court, Lemieux C.J. held that the language of s. 11, sub-s. 10, was not apt to include a judicial hypothec in Quebec, and that even if it were, its effect was merely to enable the trustees to dispose of the property, leaving the creditor with a lien upon the proceeds in the distribution of the assets. Further, he was of opinion that if the sub-section purported to deprive the creditor of a preference arising from the judicial hypothec, it was to that extent ultra vires.

On appeal to the Court of King's Bench, Appeal Side, the judgment was unanimously affirmed. The appeal is reported at Q. R. 40 K. B. 561.

An appeal to the Supreme Court of Canada was allowed by Anglin C.J. and Duff, Mignault and Newcombe JJ.; Rinfret J. dissenting. The majority of the Court, in a judgment delivered by Newcombe J., in effect answered both the above stated questions in the affirmative. Rinfret J. agreed with the view in the lower Courts. The appeal is reported at [1926] S. C. R. 218.

The Attorney-General for Quebec intervened before the hearing in the Superior Court, and was an appellant in the present appeal. The Attorney-General for Canada intervened by leave in the present appeal.

1927. Nov. 14, 15, 17. *Sir John Simon K.C.*, *Lanctot K.C.* and *M. Alexander* for the appellants. For the reasons given in the Courts in Quebec the wording of s. 11, sub-s. 10, is not apt to describe a judicial hypothec under the law of that Province. But even if it is, the enactment has not the effect contended by the respondents. On registration under art. 2121 of the Civil Code the creditor obtains a hypothec which, under art. 1616, is a real right against the property named in the notice; art. 1619 provides that a hypothec may be legal, judicial, or conventional. That right of the creditor is part of his property and civil rights. The owner of a hypothec is a "secured creditor" within the definition in s. 2 of the Bankruptcy Act, and in that capacity has the rights given by s. 46, amended by s. 38 of the Act of 1921. The true effect of the sub-section is merely to prevent a judgment being enforced by execution, or being perfected by a subsequent registration. The amendments by s. 7 of the Act of 1920, and by s. 5 of the Act of 1925, proceeded upon a misapprehension of the effect of the principal Act. A construction of that Act which assumes that it was not the intention to interfere with property and civil rights in the Province is to be preferred.

If however s. 11, sub-s. 10, purports to deprive the holder of a registered hypothec of his priority, it is ultra vires. The

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Dominion Parliament has not power under s. 91, head 21, of the British North America Act, 1867, to cancel a security, valid under the law of a Province, however long before a bankruptcy that security was obtained. The power is limited to securities obtained within a strictly limited time before a bankruptcy. Under s. 91, head 21, the Dominion Parliament can interfere with " property and civil rights in the Province," a matter which by s. 92, head 12, is within the exclusive legislative power of the Province, only if the legislation is " necessarily incidental " to the exercise of the power as to " bankruptcy and insolvency " : *City of Montreal* v. *Montreal Street Ry.* (1) ; *Attorney-General of Ontario* v. *Attorney-General for Canada.* (2)

Their Lordships desired to hear further arguments upon the question of ultra vires only.

Macmillan K.C. and *T. Mathew* for the Attorney-General for Canada, intervener. The region in which the legislation in question was operating was that of things in the nature of judgments, not of conventional rights. Having regard to the words at the end of s. 91 the power of the Province is excluded in matters coming within " the class " of " bankruptcy and insolvency," not merely in matters " necessary " in dealing with that subject. In legislating as to the distribution of the assets of an insolvent, the rights under charges, liens and hypothecs is a matter within the sphere of the authorized legislation. Some interference with civil rights was unavoidable, and did not prevent the legislation from being intra vires : *Cushing* v. *Dupuy* (3) ; *Tennant* v. *Union Bank of Canada* (4) ; *Attorney-General of Ontario* v. *Attorney-General for Canada.* (2)

St. Laurent K.C. and *Horace Douglas* for the respondents. A judicial hypothec in Quebec is not a right apart from the judgment ; it is of the nature of an execution rather than of a conventional right. A judicial hypothec is not, however, a perfected execution ; it can be enforced only by action, and upon a failure to realize the debt under a writ in execution against the debtor's movables : Civil Procedure

(1) [1912] A. C. 333, 343.
(2) [1894] A. C. 189, 200.
(3) (1880) 5 App. Cas. 409.
(4) [1894] A. C. 31.

Code, arts. 600, 614; Civil Code, arts. 2060, 2061; Pothier, Bugnet's ed., vol. ix., p. 441, §§ 66, 67. There were statutes in several Provinces postponing the rights of holders of unsatisfied judgments upon a voluntary assignment by the debtor for the benefit of his creditors. It cannot therefore be contended that that question is not within the sphere of insolvency legislation. The Dominion Legislature was entitled to deal with the matter so as to bring the various Provincial enactments into harmony.

Sir John Simon K.C. replied.

1928. Jan. 19. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. The facts leading up to this litigation are undisputed, and may be very shortly stated. On March 25, 1922, the claimant, the Royal Bank of Canada (which will be referred to as "the Bank"), obtained judgment against one Bélanger for $14,036.44 with interest and costs. On April 6, 1922, the Bank caused this judgment to be registered in the Registration Division of Quebec, and at the same time caused to be registered (in accordance with art. 2121 of the Civil Code of Quebec) a notice describing certain real estate of the debtor situate in that Division, so establishing a judicial hypothec upon that property resulting from the judgment. On April 11, 1922, the Bank registered a second notice describing other real estate of the debtor situate in the same Division, to be also affected by the judgment and the judicial hypothec thereby created. On December 24, 1923—no further steps having in the meantime been taken for enforcing the judgment and hypothec—Bélanger made an authorized assignment for the benefit of his creditors under the Bankruptcy Act of the Dominion (c. 36 of 1919), and the respondents, Larue, Trudel and Picher, were shortly afterwards appointed trustees under the assignment. The assignment and appointment were duly registered. The Bank filed a claim with the trustees, asserting a privilege in the nature of a judicial hypothec upon the real estate of the debtor described in the notices of April 6 and 11, 1922; but the trustees, on

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the authority of s. 11, sub-s. 10, of the Bankruptcy Act, rejected the claim of privilege except as regards the costs of the judgment. The Bank appealed against this rejection to the Superior Court of Quebec, which allowed the appeal, and declared the Bank entitled to the preference which it claimed; and this decision was affirmed by the Court of King's Bench of Quebec. But, on a further appeal by the trustees to the Supreme Court of Canada, that Court by a majority (consisting of Anglin C.J., and Duff, Mignault and Newcombe JJ.; Rinfret J. dissenting) reversed the decision of the Court of King's Bench and confirmed the disallowance by the trustees of the Bank's claim for privilege. The Bank now appeals to His Majesty in Council.

The questions at issue between the parties are two in number—namely, (1.) whether on the true construction of the Bankruptcy Acts of the Dominion a judicial hypothec upon real estate of a debtor resulting from the registration of a notice under art. 2121 of the Civil Code of Quebec is intended to be postponed to a subsequent authorized assignment by the debtor for the benefit of his creditors; and (2.) if on the true construction of the Bankruptcy Acts such a hypothec is intended to be so postponed, whether the Acts are in that respect within the legislative authority of the Dominion Parliament under the British North America Act, 1867. It is only if both these questions are answered in the affirmative that the judgment of the Supreme Court of Canada can stand; and it is convenient to deal with them in the above order.

1. The relevant provisions of s. 11 of the Dominion Bankruptcy Act of 1919 as originally enacted were as follows:—

"11. (1.) Every receiving order and every authorised assignment made in pursuance of this Act shall take precedence over: (*a*) all attachments of debts by way of garnishment unless the debt involved has been actually paid over to the garnishing creditor or his agent; and (*b*) all other attachments, executions or other process against property, except such thereof, as have been completely executed by payment to the execution or other creditor; but shall be

subject to a lien for one only bill of costs, including sheriff's fees, which shall be payable to the garnishing attaching or execution creditor who has first attached by way of garnishment or lodged with the sheriff an attachment, execution or other process against property; Provided that this paragraph shall not apply to any execution or other process issued against real or immovable property under or by virtue of a judgment registered prior to the coming into operation of this Act, which judgment, as the result of such registration, became, under the laws of the Province wherein it was entered, a charge, lien or hypothec upon or of such real or immovable property."

"(8.) Every receiving order and every authorised assignment (or a true copy certified as to such order by the registrar or other clerical officer of the court which has made it, and as to such assignment certified by the trustee therein named) shall be registered or filed by or on behalf of the trustee in the proper office in every district, county or territory in which the whole or any part of any real or immovable property which the bankrupt or assignor owns or in which he has any interest or estate is situate."

"(10.) From and after such registration or filing or tender thereof within the proper office to the registrar or other proper officer, such order or assignment shall have precedence of all certificates of judgment, judgments operating as hypothecs, executions and attachments against land (except such thereof as have been completely executed by payment) within such office, or within the district, county or territory which is served by such office, but subject to a lien for the costs of registration and sheriff's fees, of such judgment, execution or attaching creditors as have registered or filed within such proper office their judgments, executions or attachments."

The coming into force of the above Act had been postponed to July 1, 1920, and before it came into force it was amended by c. 34 of the statutes of that year. By s. 6 of the last mentioned statute the proviso to para. (*b*) of s. 11, sub-s. 1, which excepted from the application of that paragraph judgments registered prior to the coming into operation of

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the Act, was repealed, and all judgments, whether registered before or after July 1, 1920, were left to be governed by the general rule. Further, by s. 7 of the same Act of 1920 it was enacted as follows :—

" 7. Section 11 of the said Act is hereby amended by adding thereto the following sub-section : '(16.) The provisions of paragraphs one and ten of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in either of the Provinces of Nova Scotia and New Brunswick prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a charge, lien or hypothec upon such real or immovable property.' "

In 1925 this sub-s. 16 was amended so as to include judgments registered against real estate in the Province of Quebec prior to the coming into force of the Bankruptcy Act, and this was done by 15 & 16 Geo. 5, c. 31, s. 5, which reads as follows :—

" 5. Sub-section (16.) of section 11 of the said Act as that sub-section is enacted by section 7 of the chapter 34 of the Statutes of 1920, is hereby repealed and the following is substituted therefor : ' (16.) The provisions of sub-sections (1.) and (10.) of this section shall not apply to any judgment or certificate of judgment registered against real or immovable property in any of the provinces of Nova Scotia, New Brunswick or Quebec, prior to the coming into force of this Act, which became, under the laws of the Province wherein it was registered, a lien or hypothec upon such real or immovable property.' "

Upon a review of these enactments their Lordships are of opinion that they have been correctly interpreted by the Supreme Court as having the effect of postponing a judicial hypothec upon real estate of the debtor to an authorized assignment by the debtor for the benefit of his creditors. Sub-s. 1 of s. 11 of the Act of 1919 gives to an authorized assignment precedence over all executions against property not completed by payment to the execution creditor ; and sub-s. 10 carries the process a step further by giving to such

an assignment, when duly registered in any district, precedence over all " certificates of judgment, judgments operating as hypothecs, executions and attachments against lands (except such thereof as have been completely executed by payment) " within the district. It was stated by the learned judges of the Quebec Courts that the words " certificates of judgment, judgments operating as hypothecs," were unknown in the jurisprudence of that Province, and their Lordships of course accept that statement as showing that the precise phrase used in the statute is new to Quebec ; but the Quebec Civil Code speaks (in art. 2020) of a judicial hypothec as " resulting from " a judgment and (in art. 2121) of a judgment as " conferring " a hypothec when registered, and the expression " judgments operating as hypothecs " is a not inapt paraphrase of this language. The view taken by Lemieux C.J., in the Superior Court, that the intention of sub-s. 10 was only to transfer to the trustee of the assignment the power of realizing the property affected by the hypothec, leaving to the hypothecary creditor an effective charge on the proceeds of realization, does not appear to their Lordships to give full effect to the enactment in sub-s. 10, that the assignment is to have precedence over the judgment operating as a hypothec ; and their Lordships agree with the opinion of Newcombe J. (who gave the reasons for the judgment of the majority of the Supreme Court), that the intention of these enactments was that the assignment should have precedence of all judgments operating as hypothecs for all purposes, including the distribution as well as the realization of the assets. The suggestion, put forward by counsel for the appellants on this appeal, that the sub-section was intended to give the assignment precedence over the judgment only and not over the hypothec following upon the judgment, appears to their Lordships to have no substance ; for if a judgment operating as a hypothec is postponed to the assignment, the hypothec which it operates must surely undergo the same process.

This conclusion, which their Lordships would have been disposed to adopt on a reading of the earlier part of s. 11,

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sub-s. 10, taken by itself, is confirmed by a consideration of the latter part of that sub-section, which reserves to a judgment creditor who has duly registered his judgment a lien on the land for his costs of registration and sheriff's fees; for if the intention of the Legislature had been to leave to the hypothecary creditor his full charge on the land subject to the hypothec, it would have been unnecessary to preserve his lien for costs. Further, s. 7, sub-s. 16, of the Act of 1920, which excepted from s. 11, sub-s. 10, of the Act of 1919 any judgment registered against real property in Nova Scotia or New Brunswick before the coming into force of that Act which became under the law of the Province a charge, lien or hypothec against such property, carries a plain implication that such a judgment if registered after the coming into force of the Act of 1919 is intended to be affected by s. 11, sub-s. 10, of the Act. The Act of 1925 above cited was passed after the present dispute arose; but s. 5 of that Act, which extends the operation of s. 7 of the Act of 1920 to Quebec, shows plainly that the Dominion Legislature in 1925 interpreted the Act of 1919 as applying to that Province in the same sense.

For these reasons, which agree in substance with those given by Newcombe J., on behalf of the majority of the Supreme Court, their Lordships are of opinion that the first of the two questions above set out should be answered in the affirmative.

2. Their Lordships now turn to the second question arising on this appeal—namely whether the enactment of s. 11, sub-s. 10, of the Bankruptcy Act of 1919, as above construed, was within the powers conferred upon the Dominion Parliament by s. 91 of the British North America Act, which entrusts to that Parliament exclusive legislative authority over all matters coming within certain classes of subject there enumerated, including "bankruptcy and insolvency," or whether it infringes upon the exclusive power given by s. 92 of the same Act to a Provincial Legislature to make laws in respect of "property and civil rights" in the Province.

The expression "bankruptcy and insolvency" in s. 91, head 21, of the British North America Act was referred to

by Lord Selborne in *L'Union St. Jacques de Montréal* v. *Bélisle* (1) as " describing in their known legal sense provisions made by law for the administration of the estates of persons who may become bankrupt or insolvent, according to rules and definitions prescribed by law, including of course the conditions in which that law is to be brought into operation, the manner in which it is to be brought into operation, and the effect of its operation." In *Attorney-General of Ontario* v. *Attorney-General for Canada* (2), Lord Herschell observed that a system of bankruptcy legislation might frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated, and added: " It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the Provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament." Taking these observations as affording assistance in the construction of s. 91, head 21, of the Act of 1867, their Lordships are of opinion that the exclusive authority thereby given to the Dominion Parliament to deal with all matters arising within the domain of bankruptcy and insolvency enables that Parliament to determine by legislation the relative priorities of creditors under a bankruptcy or an authorized assignment. A creditor who has obtained judgment for his debt and has issued execution upon the debtor's lands or goods remains a creditor; and it is entirely within the authority of the Dominion Parliament to declare that such a creditor, although (as Newcombe J. expressed it) he has been " first in the race for execution " but has not yet proceeded upon his execution and become satisfied by payment, shall on the occurrence of bankruptcy or a cessio bonorum be reduced to an equality with the general body of creditors. Then is there

(1) (1874) L. R. 6 P. C. 31, 36. (2) [1894] A. C. 189, 200.

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anything in the nature of a judicial hypothec in the Province of Quebec which exempts it from the possibility of being affected in like manner by the bankruptcy law of the Dominion? In their Lordships' opinion there is nothing in the Quebec law which can have that effect. It is true that judicial hypothec is classed in the Civil Code with legal and conventional hypothecs, and is there said to establish a real right; but notwithstanding these provisions the hypothecary creditor remains a judgment creditor, and his hypothec, whether it may or may not be properly called a mode of execution, is at all events closely analogous to that process. Indeed their Lordships were informed that art. 614 of the Code of Civil Procedure of Quebec has been held to require such a creditor to cause the movable goods of the debtor to be realized under the judgment before he can enforce his hypothec against the land. There is nothing therefore in the nature of a judicial hypothec which for the purpose now in question distinguishes it from an execution levied upon land, and Lord Herschell's judgment above cited shows clearly that such an execution may lawfully be postponed by Dominion Act.

The contention that the enactment of s. 11, sub-s. 10, of the Bankruptcy Act infringes the authority of the Provincial Legislature to deal with property and civil rights is effectively dealt with by Newcombe J. No doubt it was within the competence of the Provincial Legislature to give to a judicial hypothec the quality of a real right; but if and so soon as that enactment comes into conflict with a Dominion statute duly passed under the authority of s. 91 of the Act of 1867, then the Dominion statute prevails over the Provincial legislation and takes effect according to its tenor. The decisions of this Board relating to what is sometimes called the "unoccupied field" are referred to in the judgment of Newcombe J., and conclusively establish this point.

The thesis that a postponement or annulment of the rights of creditors who under a Provincial law have obtained preferential rights is within the domain of bankruptcy legislation receives support by reference to a series of Provincial statutes to which Mr. St. Laurent in an able

argument called their Lordships' attention. The Assignments and Preferences Act of Ontario (R. S. Ont. 1914, c. 134) enacted (by s. 14) that an assignment for the general benefit of creditors under that Act should take precedence of attachments, garnishee orders, judgments, executions not completely executed by payment and orders appointing receivers by way of equitable execution, subject to a lien for the execution creditor's costs. Similar provisions were contained in the Assignments Act of Manitoba (R. S. Man. 1913, c. 12, s. 8), the Assignments Act of Saskatchewan (R. S. Sask. 1909, c. 142, s. 9), the Creditors' Trust Deeds Act of British Columbia (R. S. B. C. 1911, c. 13, s. 14), the Act of New Brunswick respecting Assignments and Preferences by Insolvent Persons (R. S. N. B. 1903, c. 141, s. 9), and (except as to lands) the Assignments Act of Nova Scotia (R. S. N. S. 1923, c. 200, s. 46). In all these cases the Provincial Legislatures when dealing with assignments by insolvents included in their legislation provisions postponing an execution to the general right of an assignee for the benefit of creditors ; and it would be difficult to reconcile the course so taken by those Legislatures with the contention that such a postponement is not within the domain of bankruptcy law. It may be added that, since the " unoccupied field " where such priorities are regulated has been occupied by the bankruptcy Acts of the Dominion, most of these Provincial enactments have been repealed.

In the result their Lordships find themselves in agreement upon both questions with the reasoning and conclusions of the majority of the Supreme Court of Canada, and they will humbly advise His Majesty that this appeal fails and should be dismissed. The appellants will pay the costs of the respondent trustees.

Solicitors for appellants : *Blake & Redden.*
Solicitors for respondents : *Lawrence Jones & Co.*
Solicitors for intervener : *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.*
1928
Feb. 2.

HIRSCH AND ANOTHER . . . . . APPELLANTS;

AND

PROTESTANT BOARD OF SCHOOL COMMISSIONERS OF MONTREAL AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Legislative Authority—Education—Quebec Educational System—Jews—Protestants—Denominational Schools—24 Vict. c. 15 (Lower Canada)—3 Edw. 7, c. 16 (Queb.)—British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93.

The Quebec Legislature in 1903 passed an Act, 3 Edw. 7, c. 16, which provided that persons professing the Jewish religion should, for school purposes, be treated as Protestants and have the same rights and privileges; that their children should have the same right of education as Protestant children; and that school taxes paid by them should go to the support of the Protestant schools.

Under statutes of Lower Canada consolidated in 1861 by 24 Vict. c. 15 there were outside the cities of Quebec and Montreal (the rural area) common schools and dissentient schools, and within those cities Roman Catholic separate schools and Protestant separate schools.

The British North America Act, 1867, by s. 93 conferred on Provincial Legislatures exclusive power to make laws in relation to education, but, by proviso 1 preserved "any right or privilege with respect to denominational schools which any class of persons had by law," and by proviso 2 enacted that privileges conferred by law on separate Roman Catholic schools in Upper Canada should be extended to dissentient schools of Roman Catholics and Protestants in Quebec:—

Held, (1.) That the word "Protestant" in the statutes consolidated in 1861 could not be construed as "non-Catholic," and so as including Jews; and that the Protestant community, though divided for certain purposes into denominations, was itself a denomination and capable of being regarded as "a class of persons" within s. 93, sub-s. 1, of the Act of 1867.

(2.) That having regard to the provisions of the Act of 1861 as to management and control, the dissentient schools in the rural area, and the separate schools in the two cities, had rights and privileges within s. 93, proviso 1; but that the common schools in the rural area had not,

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD DARLING, and LORD WARRINGTON OF CLYFFE.

as although each school might in fact be controlled by persons of the faith of the majority, that was not a right or privilege which "a class of persons had by law."

Maher v. *Town of Portland* (1874, J. C.), Wheeler's Confederation Law of Canada 338, 367 followed.

(3.) That the Act of 1861 impliedly reserved the right of attendance at dissentient schools in the rural area to children of the religion of the dissentients; in any case proviso 2 to s. 93 of the Act of 1867 had that effect.

(4.) That the provisions as to the management and control of separate schools in the two cities gave them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith.

City of Winnipeg v. *Barrett* [1892] A. C. 445, 453 to 456; *Brophy* v. *Attorney-General of Manitoba* [1895] A. C. 202, 226, 227; and *Ottawa Separate School Trustees* v. *Mackell* [1917] A. C. 62, 67 followed.

(5.) That, consequently, 3 Edw. 7, c. 16 (Queb.), although otherwise intra vires, was ultra vires so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the cities of Quebec or Montreal or on any Protestant Board of Examiners, or take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside those cities upon persons of religious faith different from that of the dissentient minority.

(6.) That it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities, and that legislation so limited would be valid.

Judgment of the Supreme Court of Canada [1926] S. C. R. 246, in answer to referred questions, varied as to answers 1 and 2*a*, but otherwise affirmed.

APPEAL (No. 67 of 1926) by special leave from a judgment of the Supreme Court of Canada (February 2, 1926) on appeal from a judgment of the Court of King's Bench of Quebec, Appeal Side (March 11, 1925).

The judgments were in answer to seven questions referred to the Court of King's Bench by the Lieutenant-Governor of Quebec, relating primarily to the effect, and the validity under s. 93 of the British North America Act, 1867, of an Act of the Quebec Legislature of 1903, being 3 Edw. 7, c. 16.

The said Act provided, shortly stated, that Jews should, for school purposes, be treated as Protestants, and have the same rights, privileges and obligations.

The questions referred, the answers thereto by the

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Court of King's Bench and the Supreme Court, and the material terms of 3 Edw. 7, c. 16, and of s. 93 of the British North America Act, 1867, appear from the judgment of the Judicial Committee.

The proceedings in the Supreme Court are reported at [1926] S. C. R. 246.

1927. Nov. 29; Dec. 1, 2, 5. *Sir John Simon K.C.*, *St. Laurent K.C.*, *M. Alexander* and *F. Gahan* for the appellants.

G. A. Campbell K.C., *Creelman K.C.* and *Pritt K.C.* for the Protestant Board, respondents.

Perrault K.C. for the Roman Catholic Board, respondents.

Lanctot K.C. for the Attorney-General for Quebec respondent.

Horace Douglas for the respondent Schubert.

Lafleur K.C. and *Pritt K.C.* for the Protestant Committee of Public Instruction (Quebec), interveners.

1928. Feb. 2. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. This appeal, which raises questions of great importance in relation to public education in the Province of Quebec, had its first origin in the decision of the Superior Court of Quebec in the case of *Pinsler* v. *Protestant Board of School Commissioners of Montreal.* (1) In that case Davidson J. held, on the construction of the Quebec Education Act of 1899, that a person professing the Jewish faith, not being the owner of real estate inscribed on the Protestant panel for the purposes of the City school tax, could not compel the Protestant School Commissioners to admit his son as of right to a school under their control.

In consequence of this decision the Legislature of the Province passed in the year 1903 an Act (3 Edw. 7, c. 16) which provided as follows :—

"1. Any provision to the contrary notwithstanding, in all the municipalities of the Province, whether governed,

(1) (1903) Q. R. 23 S. C. 365.

as regards schools, by the Education Act or by special laws, or by the Education Act and by special laws, persons professing the Jewish religion shall, for school purposes, be treated in the same manner as Protestants, and, for the said purposes, shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter. . . . . 6. After the coming into force of this Act, the children of persons professing the Jewish religion shall have the same right to be educated in the public schools of the Province as Protestant children, and shall be treated in the same manner as Protestants for all school purposes." By the intervening sections (ss. 2 to 5), provision was made for giving to the Protestant school authorities throughout the Province the benefit of school taxes and contributions paid by or in respect of persons professing the Jewish religion.

This statute was put in force for some years, but eventually—the number of Jewish children attending the Protestant schools in Montreal having greatly increased (it is said to have risen from 2144 in 1903 to 11,974 in 1923) —it was found that the taxes and allowances received by the Protestant Board in respect of Jewish children were considerably less than the cost of educating those children, and a question was raised by the Board as to the validity of the Act of 1903. An Act passed by the Quebec Legislature in 1922 for increasing the subvention out of the school fund to the Protestant Board (12 Geo. 5, c. 44) failed to put an end to the dispute, and on July 21, 1924, the Lieutenant-Governor appointed a Commission, upon which Roman Catholics, Protestants and Jews were equally represented, to inquire into (among other things) the question of the instruction of Jewish children in the Protestant or other schools. The Commission, being divided in opinion as to the validity of the statute of 1903 and other matters, recommended that the Governor of Quebec should submit to the Court of Appeal and (if necessary) to the Privy Council the questions of law which had been raised; and, accordingly, on February 3, 1925, the Lieutenant-Governor

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in Council submitted to the Court of King's Bench (Appeal Side) the following questions :—

1. Is the Statute of Quebec of 1903 (3 Edw. 7, c. 16) ultra vires ?

2. Under the said statute—(*a*) can persons of Jewish religion be appointed to the Protestant Board of School Commissioners of the City of Montreal ? (*b*) is the Protestant Board of School Commissioners of the City of Montreal obliged to appoint Jewish teachers in their schools should they be attended by children professing the Jewish religion ?

3. Can the Provincial Legislature pass legislation providing that persons professing the Jewish religion be appointed—(*a*) to the Protestant Board of School Commissioners of the City of Montreal ; or (*b*) to the Protestant Committee of Public Instruction ; or (*c*) as advisory members of these bodies ?

4. Can the Provincial Legislature pass legislation obliging the Board of School Commissioners of the City of Montreal to appoint teachers professing the Jewish religion in their schools should they be attended by children professing that religion ?

5. Can the Provincial Legislature pass legislation providing for the appointment of persons professing the Jewish religion on the proposed Metropolitan Financial Commission outlined in the project submitted by Messrs. Hirsch and Cohen ?

6. Can the Provincial Legislature pass legislation to establish separate schools for persons who are neither Catholics nor Protestants ?

7. Assuming the Act of 1903 to be unconstitutional, have the Protestants the right under the present state of the Quebec law to allow children professing the Jewish religion to attend the schools—(*a*) as a matter of grace ; (*b*) as of right ? (*c*) can the Province force the Protestants to accept children professing the Jewish religion under such conditions ?

An Act passed by the Quebec Legislature on April 3, 1925 (15 Geo. 5, c. 19), authorized an appeal as to the matters so submitted from the Court of King's Bench to the

Supreme Court of Canada, and from that Court (subject to leave being obtained) to His Majesty in Council.

The Court of King's Bench (Appeal Side), subject to certain reservations and dissents which it is not necessary to set out in detail, answered the above questions numbered 1, 2 (*a*), and 7 (*a*) and (*b*) in the affirmative, and the remaining questions in the negative; but on appeal by the present appellants (being two of the Jewish members of the Commission above referred to) to the Supreme Court of Canada, that Court (consisting of Anglin C.J., and Mignault, Newcombe, Rinfret, and McLean JJ.) agreed upon the following answers:—

Question No. 1.—Answer: No, except in so far as it would confer the right of attendance at dissentient schools upon persons of a religious faith different from that of the dissentient minority.

Question No. 2.—Answers: To part (*a*), No. To part (*b*), No.

Question No. 3.—Answers: To part (*a*), No. To part (*b*), This Committee is the creature of post-Union legislation, and, therefore, its personnel is subject to Provincial legislative control; but, as it is presently constituted, only Protestants are eligible for appointment to it. To part (*c*). This question can be answered only when the powers and duties of such advisory members shall have been defined.

Question No. 4.—Answer: No.

Question No. 5.—Answer: No.

Question No. 6.—Answer: Yes. Such legislation would not necessarily interfere prejudicially with rights and privileges enjoyed either by Roman Catholics or Protestants as a class at the Union. Such interference, of course, could not be allowed.

Question No. 7.—Answer: It is impossible to answer this question categorically and difficult to answer it intelligently. We deal with it as follows:—We assume that the question is to be answered having regard to the law of the Province of Quebec bearing on educational matters, in so far as such law is valid, exclusive of the Act

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of 1903, and that "Protestants" in the question means the Protestant Board of School Commissioners of the City of Montreal and the Trustees of the Protestant dissentient schools in rural municipalities.

To part (*a*) the answer is: Yes.

To part (*b*). Further, assuming that the inquiry intended is whether Jewish children have the right to attend Protestant schools, with a correlative obligation on the part of the Boards of Protestant School Commissioners and Trustees to admit children professing the Jewish religion to the schools respectively under their control and to provide therein for their education, the answer is:—In the City of Montreal: Yes. In the rural municipalities: No.

To part (*c*). The words "Under such conditions" are quite unintelligible. It is impossible to discern what conditions are meant to be imparted. Eliminating them from the question, the answer is:—In the City of Montreal: Yes. In the rural municipalities: No.

The appellants have obtained special leave to appeal from this decision to His Majesty in Council.

The solution of the main question to be determined on this appeal—namely, the question whether the Quebec statute of 1903 above referred to is or is not ultra vires, depends upon the effect to be given to s. 93 of the British North America Act of 1867, which provides as follows:—

93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union; (2.) All the powers, privileges and duties at the Union by law conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects shall be and the same are hereby extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec.

The succeeding two paragraphs of the section provide for an appeal to the Governor-General in Council from any act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the King's subjects in relation to education; but it was not contended before this Board that these provisions—which were the subject of discussion in a Manitoba case (*Brophy* v. *Attorney-General of Manitoba* (1)), had the effect of ousting the jurisdiction of the Courts, and it is unnecessary to refer to them again.

In order to determine whether the restrictions imposed by s. 93 of the Act of 1867 are infringed by the Quebec statute of 1903, it is necessary to consider, first, whether any and which of the schools referred to in that statute were denominational schools in which any class of persons had by law any right or privilege at the Union, and, secondly, whether and to what extent that statute prejudicially affects any such right or privilege. For the purpose of this inquiry it is not necessary to recite the earlier statutes of Lower Canada dealing with public education, which are effectively summarized in the judgment of Flynn J. in this case, and it will be sufficient to state shortly the provisions of the consolidating statute of 1861 (24 Vict. c. 15), which was in force at the date of the Union.

The effect of the statute of 1861 was to establish two somewhat different educational systems—namely, one system for Lower Canada outside the cities of Quebec and Montreal (which may be referred to as the "rural area") and another system for those two cities.

In the rural area there were set up two classes of school for the elementary instruction of youth, that is to say, (*a*) in each municipality, one or more common schools managed by School Commissioners elected by all the landholders and householders of the municipality other than the dissentient inhabitants to be hereafter referred to, and (*b*) in any municipality in which any number of inhabitants professing a religious faith different from that of the majority had signified such dissent, one or more schools

(1) [1895] A. C. 202.

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managed by Trustees appointed by the dissentients. These schools were maintained partly by monthly school fees, partly by allowances out of the common school fund, and partly by a school rate levied by the School Commissioners, or, in the case of dissentients, by their Trustees. The teachers at each school were appointed by the Commissioners or Trustees in charge of the school, having first been examined by a Board of Examiners for the county, which might (if the Governor in Council so ordained) be organized in two divisions, one Roman Catholic and the other Protestant. The course of study to be followed in each school was regulated by the Commissioners or Trustees (as the case might be), but it was provided (by s. 65 of the Act) that "the curé, priest or officiating minister shall have the exclusive right of selecting the books having reference to religion and morals for the use of the schools for children of his own religious faith." The schools in each municipality were to be visited periodically by Visitors consisting of the resident clergy and other official persons; but no priest, minister or ecclesiastic was to visit a school belonging to inhabitants not of his own persuasion except with the consent of the Commissioners or Trustees of the school (s. 121). Children from 5 to 16 years of age residing in any school district were to have a right to attend "the school thereof" upon payment of the monthly fees (s. 66); but this provision does not appear to have applied to the dissentient schools, which were reserved (except as a matter of favour) for children of the dissentient faith residing in the district and (if there was room) for children from other school districts "of the same faith as the dissentients for whom the school was established" (s. 56). This reservation, though not clearly stated in the Act, appears to be deducible from its terms; and if there be any doubt upon the point, it is removed by para. 2 of s. 93 of the British North America Act, which extends to dissentient schools in Quebec all the powers and privileges by law conferred on the Roman Catholic schools of Upper Canada, including the provisions of the Upper Canada Act of 1863 (26 Vict. c. 5).

It is convenient at this stage to deal, as regards these schools in the rural area, with the first of the two questions above formulated, namely, whether any and which of them were denominational schools in which any class of persons had by law any right or privilege at the Union. That the dissentient schools in the rural area fall within that category can hardly be doubted. Where a school is founded by a body of Protestants and is maintained by their contributions and managed by Trustees appointed by them, where its teachers are chosen by those Trustees after examination by a Protestant Board of Examiners, where its religious books are selected by the Protestant minister and admission to the school is confined (except by favour) to the children of Protestant parents, it would be affectation to call that school anything but a denominational school; and the same is equally true of a like dissentient school under Roman Catholic control. It is plain also that the dissentient supporters of such a school, who are bound together by a common religious faith, form a "class of persons" having special rights and privileges with respect to the school, including the right to appoint the managing Trustees and through those Trustees to select the teachers at the school, to control the course of study and to exclude children of another faith. But the same cannot (their Lordships think) be said of a common school in the rural area not being a separate or dissentient school. Such a school, if in a single school district, is under the management of Commissioners appointed by the whole body of landholders and householders in the district without regard to their religious faith; and even in a district where a minority has established its own separate school, the electors who remain need not be all of the same religious persuasion. No doubt it is true, as stated by the Canadian Courts, that in most of the school districts in the rural area the majority of the landholders and householders are Roman Catholics, and, accordingly, that the common schools in those districts (other than the dissentient schools) are in fact controlled by members of that religious community; but, if so, the

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result is due to the circumstances of the particular school districts, and it is not a right or privilege to which any class of persons are " by law " entitled.

In a New Brunswick case (*Maher* v. *Town of Portland* (1)), James L.J., who delivered the judgment of this Board, dealt with a similar contention as follows: " It has been contended on the part of the appellant that de facto they became denominational schools in this way—that is to say, that whereas the whole machinery was left local, that the ratepayers had the power of appointing the master, the ratepayers had the power of appointing the Trustees of the schools, but where the whole inhabitants of a district or the great majority of a district belonged to the Roman Catholic faith or belonged to a Protestant sect, there they could so work the school practically as to give it a denominational character or a denominational hue; that is to say, if all the children were Roman Catholics, Roman Catholic teaching would be found in that school. But the fact that that might be the accidental result of the mode of working the Act under the old system is not to give a legal right to that denomination, which was the right alone which was intended to be protected by the Federation Act of the Dominion of Canada. It is an accident which might have happened to-day, and might have been reversed to-morrow by a change of the inhabitants of the district or a change in their views; and that is not a thing to which it is possible to give the colour of a legal right." It appears to their Lordships that this reasoning, although relating to a different statute, applies to the common schools (other than dissentient schools) in the rural area, and accordingly that as regards that area the separate or dissentient schools alone come within the protection of s. 93 (proviso 1) of the Act of 1867.

Turning now to the cities of Quebec and Montreal, it appears that, while the public educational system established in those cities by the Act of 1867 was similar in many of its features to that of the rural area, there were important

(1) (1874.) Wheeler's Confederation Law of Canada, 338, 367.

differences. It may be (as suggested by Rivard J.) that it appeared to the Legislature that in these centres, where there was already a dense population and a mixture of religious beliefs, it was unnecessary to require a minority to declare its dissent, and that two kinds of school should at once be set up. But, however that may be, the statute, so far as it applied to the two cities, did not divide the schools into majority and minority schools, but into Roman Catholic and Protestant schools. Each city was to be considered for the purposes of the Act as one municipality, and each school was to be considered a school district. In each city the schools were to be managed by twelve School Commissioners appointed by the Corporation, of whom six were to be Roman Catholic and six Protestant; and such Commissioners were to "form two separate and distinct corporations, the one for Roman Catholics and the other for Protestants" (s. 130). No special school rate was to be levied, but payments were to be made by the City Treasurer to the respective Boards of Commissioners "in proportion to the population of the religious persuasion represented by such Boards respectively" (s. 131). Each Board was to manage its own schools and appoint the teachers; but such teachers were to be previously examined by a Board of Examiners appointed by the Governor in Council through the Superintendent of Education, one-half of such Board being Roman Catholics and the other half Protestants, and each of such halves acting separately from the other (s. 103). The provisions of s. 65 as to the choice of books having reference to religion and morals apparently applied to the City schools, so that the religious books for Roman Catholic schools would be chosen by the Roman Catholic curé or priest and the religious books for the Protestant schools by the Protestant priest or minister. Any school managed by either Board could be attended by any child in the city of the specified age (ss. 66, 128 and 129).

Then, were the common schools in the cities of Montreal and Quebec denominational schools in which any class of persons had by law a right or privilege at the Union? In

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their Lordships' opinion they were. Every common school in either city was under the management and control of a Board of Commissioners chosen from persons of a particular religious faith, and each of these Boards is referred to (in s. 131) as "representing" a religious persuasion. The school fund contributed by the corporation was to be apportioned between the two Boards in proportion to the religious persuasions which they respectively represented, and therefore roughly (although not precisely) according to the religious faiths of those who contributed to the fund. The examination of teachers, the selection of religious books, and the right to visit the schools were based on a like separation of faiths. It is true that in the two cities a school belonging to either Board might before the date of Confederation be attended by children of a faith different from that represented by the Board; but it appears to their Lordships that the provisions for the management and control of the schools by persons of a particular religious persuasion set upon them a denominational stamp which could not be effaced by the attendance of a certain number of children of a divergent faith. The Roman Catholics in Montreal or Quebec formed a class of persons who had the right and privilege of having their schools controlled and managed by Commissioners of that religious persuasion and their teachers examined by Examiners of the same persuasion; and like privileges belonged to the Protestants of each city with regard to the schools controlled by the Protestant Board of Commissioners. This view is confirmed, not only by expressions contained in the judgments of this Board in the Manitoba cases (*City of Winnipeg* v. *Barrett* (1); *Brophy* v. *Attorney-General of Manitoba* (2); and in the Ottawa case (*Ottawa Separate School Trustees* v. *Mackell* (3)), but also by the emphatic statements of the experienced judges who dealt with this matter in the Canadian Courts. Anglin C.J., in delivering the unanimous judgment of the Supreme Court of Canada, said that "under the Act of

(1) [1892] A. C. 445, 453 to 456. (2) [1895] A. C. 202, 226, 227.
(3) [1917] A. C. 62, 69.

1861 there were no dissentient schools either in Montreal or Quebec, although no doubt the schools in those cities were denominational schools," and, again, that "nobody doubted that the Roman Catholic and Protestant separate schools of Quebec and Montreal were denominational schools or that the Protestants were a class of persons whose rights and interests were protected"; and similar expressions may be found in the judgments delivered in the Court of King's Bench. Their Lordships cannot but assent to the views so expressed.

It may be added that, in their Lordships' opinion, the contention, put forward by counsel for the appellants, that the word "Protestant" in the statutes must be construed as meaning non-Catholic and so as including Jews, is quite untenable; and also that the Protestant community, although divided for some purposes into different denominations, is itself a denomination and capable of being regarded as a "class of persons" within the meaning of s. 93 of the Act of 1867.

It appears that the boundaries of the cities of Montreal and Quebec have since the Union been extended, and that the Roman Catholic and Protestant Boards of Commissioners have carried their operations into the added areas. The Supreme Court refrained from pronouncing an opinion as to the effect of any such annexation on school rights in the annexed territories, and their Lordships accordingly do not deal with that question; but it is clear that no post-Union annexation of territory could deprive any class of person of the protection afforded to them by s. 93 of the Act of 1867.

It is now possible to deal with the second of the questions formulated above, namely, whether and to what extent the Quebec statute of 1903 prejudicially affects any right or privilege to which any class of persons was by law entitled at the Union. Sect. 1 of the Act provides that "any provision to the contrary notwithstanding, in all the municipalities of the Province . . . . persons professing the Jewish religion shall for school purposes be treated in the

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same manner as Protestants and for the said purposes shall be subject to the same obligations and shall enjoy the same rights and privileges as the latter." This is very wide and comprehensive language, and, notwithstanding the forcible reasoning of Anglin C.J. to the contrary, their Lordships incline to the view that it would authorize the appointment of professing Jews to the Protestant Boards of Commissioners and Examiners in Montreal or Quebec, and might even justify a claim on the part of Jewish inhabitants in the rural area to join with Protestants in forming a dissentient school and appointing its Trustees. If so, the section plainly infringes the rights and privileges of Protestants in the Protestant schools in the city areas and in the dissentient schools elsewhere. Further, s. 6 of the Act, so far as it purports to enable a professing Jew to send his children as of right to a Protestant dissentient school in the rural area, is an infringement of the rights belonging to Protestants at the Union and so goes beyond the legislative authority of the Provincial Legislature. With regard to ss. 2 to 5 of the Act, while they may no doubt require consideration by the Quebec Legislature in view of the decision in the present case, their Lordships agree with the view taken by the Supreme Court that they are not in themselves void as infringing s. 93 of the Act of 1867.

For the above reasons their Lordships are of opinion that the answers to questions 1 and 2 (*a*) should be varied so as to run as follows :—

QUESTION 1. No, except so far as it would enable persons professing the Jewish religion to be appointed to the Protestant Board of School Commissioners in the City of Quebec or Montreal or to any Protestant Board of Examiners or to take part with Protestants in the establishment of a dissentient school outside those cities, and except so far as it would confer the right of attendance at dissentient schools outside the cities of Quebec and Montreal upon persons of religious faith different from that of the dissentient minority.

QUESTION 2 (*a*). On the construction of the statute, yes.

The above observations enable their Lordships to deal shortly with the questions numbered 2 (*b*), 3, 4, 5 and 7; and it is sufficient to say that they agree with the answers to those questions given by the Supreme Court.

There remains for consideration the sixth question, which asks whether the Provincial Legislature can pass legislation to establish separate schools for persons who are neither Catholics nor Protestants. This question is framed in very general terms, and their Lordships have from time to time expressed their reluctance to give an opinion upon abstract and hypothetical questions which have not yet arisen in a concrete form; but the question now under consideration bears so close a relation to those which have been already dealt with that it would be difficult to arrive at a conclusion as to those other questions without forming an opinion upon the subject-matter of the sixth question, and their Lordships think it right to say that upon this question also they are in accord with the opinion expressed by the Supreme Court of Canada. While s. 93 of the Act of 1867 protects every right or privilege with respect to denominational schools which any class of persons may have had by law at the Union, it does not purport to stereotype the educational system of the Province as then existing. On the contrary, it expressly authorizes the Provincial Legislature to make laws in regard to education subject only to the provisions of the section; and it is difficult to see how the Legislature can effectively exercise the power so entrusted to it unless it is to have a large measure of freedom to meet new circumstances and needs as they arise. The statute protects the rights which at the Union belonged to the Roman Catholic population as a class, as well as those belonging to the Protestant population as a class; but to treat members of both denominations, who substantially made up the whole population of the Province at the time of the Union, as forming together a "class of persons" with a right to object to the establishment of any school not under Christian control, would be to give a meaning to the statute which its words will not bear. It appears to their Lordships

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that it would be possible to frame legislation for establishing separate schools for non-Christians without infringing the rights of the two Christian communities in their denominational schools; and they agree with the Supreme Court that legislation confined within those lines would be valid. It is hardly necessary to add that this Board, like the Supreme Court, have dealt with all the questions as questions of law and have in no way concerned themselves with any question of policy.

For the above reasons their Lordships are of the opinion that the decision of the Supreme Court of Canada should be affirmed with the variations above set out, and they will humbly advise His Majesty accordingly. The appellants should pay the costs of the respondent Boards of School Commissioners and of the respondent Joseph Schubert of this appeal. The Protestant Committee of the Council of Public Instruction for Quebec, who obtained special leave to intervene before this Board, and the Attorney-General of Quebec should bear their own costs; but the sum of 150*l.* deposited by the Protestant Committee should be returned to them.

Solicitors for appellants, and for the Attorney-General for Quebec: *Blake & Redden.*

Solicitors for respondents and interveners: *Lawrence Jones & Co.*

[HOUSE OF LORDS.]

Applied. HOPKINS v. HOPKINS [1951] P. 116

LEVENE . . . . . APPELLANT ;

AND

COMMISSIONERS OF INLAND REVENUE . . . . . RESPONDENTS.

H. L. (E.)*
1928
March 9.

Revenue—Income Tax—Residence in United Kingdom—Ordinary Residence—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 46, *sub-s.* 1—*General Rules applicable to Sch. C, r.* 2 (*d*)—*General Rules applicable to All Schedules, r.* 3.

The appellant, a British subject, lived in London until 1919, when he left England under medical advice with the intention of living abroad. He returned to the United Kingdom for a period of about five months in each year until 1925 for the purpose of obtaining medical advice, visiting his relatives, taking part in certain Jewish religious observances, and dealing with his income tax affairs. He had no fixed residence either in the United Kingdom or abroad during those years. The appellant was assessed to income tax for the fiscal years 1920–21 to 1924–25 in respect of his income from (*a*) securities of British possessions and (*b*) British War Loan. He claimed relief under r. 2 (*d*) of the General Rules applicable to Sch. C, and under s. 46 of the Income Tax Act, 1918, on the ground that he was neither "resident" nor "ordinarily resident" in the United Kingdom for the years in question. The Special Commissioners of Income Tax came to the conclusion that he was resident and ordinarily resident in the United Kingdom during these years and dismissed his claim :—

Held, that the conclusions of the Commissioners were findings of fact, and that, there being evidence to support them, they could not be disturbed.

Observations of the Lord Chancellor on the meaning of "resident" and "ordinarily resident" for the purposes of the Income Tax Act, 1918.

Decision of the Court of Appeal [1927] 2 K. B. 38 affirmed.

APPEAL from an order of the Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) affirming an order of Rowlatt J. (1), who affirmed a decision of the Commissioners for the Special Purposes of Income Tax Acts.

The facts found by the case stated by the Special Commissioners are set out in the report of the case before Rowlatt J.

* *Present :* VISCOUNT CAVE L.C., VISCOUNT SUMNER, LORD ATKINSON, LORD BUCKMASTER, and LORD WARRINGTON OF CLYFFE.

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and the Court of Appeal and sufficiently appear from the opinion of the Lord Chancellor, and they are summarized in the headnote.

1928. Jan. 26, 27. *Maugham K.C.* and *J. Nissim* for the appellant. The Income Tax Acts never intended to charge as residents persons who are here for temporary purposes only. This may be inferred from Lord Herschell's statement in *Colquhoun* v. *Brooks* (1) of the general principle underlying the Income Tax Acts and from the language of s. 39 of the Income Tax Act, 1842. "Residence" for income tax purposes connotes something in the nature of a permanent home. This, however, does not exclude the case of a man who lives at a hotel, provided he makes his home there. A person with a home or fixed abode here might well satisfy the tests of residence, although he was absent for most of the year. But, if residence connotes a home or fixed abode, then residence here for temporary specific purposes is not residence for the purposes of the Income Tax Acts: *Attorney-General* v. *Coote* (2); *In re Young* (3); *Rogers* v. *Inland Revenue* (4); *Lloyd* v. *Sulley* (5); *Cooper* v. *Cadwalader* (6); *Bayard Brown* v. *Burt* (7); *Turnbull* v. *Foster* (8); *Thomson* v. *Bensted* (9); *Pickles* v. *Foulsham* (10); *Loewenstein* v. *De Salis* (11); *Reid* v. *Inland Revenue Commissioners* (12); *Inland Revenue Commissioners* v. *Zorab* (13); *In re Norris.* (14)

Upon the facts the appellant was here during the years in question in the character of a visitor or sojourner and there was no evidence to support the finding of the Commissioners that he continued to be resident in the United Kingdom. Further, the Commissioners have misdirected themselves by looking at the facts of all the years taken together. The assessments must be considered year by year

(1) (1889) 14 App. Cas. 493, 504.
(2) (1817) 4 Price, 183, 187.
(3) (1875) 1 Tax Cas. 57, 59.
(4) (1879) 1 Tax Cas. 225.
(5) (1884) 2 Tax Cas. 37, 41, 42, 44.
(6) (1904) 5 Tax Cas. 101.
(7) (1911) 5 Tax Cas. 667.
(8) (1904) 6 Tax Cas. 206.
(9) (1918) 7 Tax Cas. 137.
(10) (1925) 9 Tax Cas. 261.
(11) (1926) 10 Tax Cas. 424.
(12) 1926 S. C. 589; 10 Tax Cas. 673.
(13) (1926) 11 Tax Cas. 289.
(14) (1888) 4 Times L. R. 452.

on the facts then known. Even if the appellant was resident here for income tax purposes he was not ordinarily resident here for War Loan purposes. The question is what is the meaning of the contract which the Government has entered into with the persons who buy War Loan. This question depends on no general principle of income tax law, and the cases under the earlier Acts have no relevance. The contract is to be construed contra proferentem. For the purposes of this contract "ordinarily resident" means predominantly resident in the year of assessment; the question depends on the duration of the residence in the particular year. A person cannot be ordinarily resident in two countries at once in the same year: see *Reid* v. *Inland Revenue Commissioners* (1), per Lord Blackburn.

Sir Douglas Hogg A.-G., *Sir Thomas Inskip S.-G.* and *Reginald Hills* for the respondents were not called upon.

The House took time for consideration.

1928. Mar. 9. VISCOUNT CAVE L.C. (read by LORD ATKIN). My Lords, the appellant, Mr. L. N. Levene, has been assessed to income tax on his dividends from securities of British possessions and from War Loan for the tax year 1921–22 and the succeeding three tax years, and has claimed to be excused from such tax, that is to say, from tax on the dividends from the securities of British possessions on the ground that during the years in question he was not "resident" in the United Kingdom within the meaning of r. 2 (*d*) of the General Rules applicable to Sch. C of the Act, and from tax on the dividends on War Loan on the ground that during the same years he was not "ordinarily resident" in the United Kingdom within the meaning of s. 46, sub-s. 1, of the Income Tax Act, 1918. On appeal to the Special Commissioners under s. 27 of the Finance Act, 1924, those Commissioners disallowed the appellant's claim to exemption and confirmed the assessment, subject to a case which they stated for the opinion of the High Court;

(1) 10 Tax Cas. 673, 681–2.

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and on the argument of the case the decision of the Commissioners was affirmed by Rowlatt J. and afterwards by the Court of Appeal. Mr. Levene has now appealed to this House.

From the Case stated by the Special Commissioners it appears that the appellant is a British subject, and formerly lived in a house in Curzon Street, London, of which he held a lease, until the month of March, 1918, when he decided to break up his establishment and (to use his own expression) to "live abroad"; that he then sold his furniture and surrendered the lease of his house, and until December, 1919, continued to live in the United Kingdom, in hotels. In December, 1919, he went abroad and did not return until July 10, 1920, since when he has been in the United Kingdom for the following periods:—

	Weeks.
1920—July 10 to November 24 . . .	19
1921—July 2 to November 27	21
1922—April 9 to June 18 . . . } September 10 to November 19 } .	20
1923—April 12 to June 27 . . } September 10 to November 15 } .	20
1924—April 10 to July 1 . . . } September 10 to November 23 } .	22

During the remainder of these five years he was staying at Monaco and at various places in France.

From March, 1918, until January, 1925, the appellant had no fixed place of abode, but stayed in hotels, whether in this country or abroad. In the course of the years 1922, 1923 and 1924, he made endeavours to find a suitable flat in Monaco, but the negotiations came to nothing since none of the premises inspected were suitable, until in January, 1925, the appellant took a lease of a flat in Park Palace, Monte Carlo, for nine years, for which he paid a premium of 130,000 francs, and he lived there with his wife until he came to England for the purposes of the appeal to the Commissioners. Both he and his wife have indifferent health, and have been advised to live in the South of France and avoid the

United Kingdom in the winter months. One of the reasons for their visits to England was to obtain medical advice. They also came to visit their relatives in England, and (on one occasion) to make arrangements for the care of a brother of the appellant who is mentally afflicted. Other reasons for his coming to England annually were to take part in certain Jewish religious observances, to visit the graves of his parents, who are buried at Southampton, and to deal with his income tax affairs.

After setting out the above facts and the contentions of the parties, the Commissioners gave their decision in the following terms :—

" The appellant is a British subject and until March, 1918, he was a householder in London. He then surrendered the lease of his house and sold his furniture, and from March, 1918, until January, 1925, he did not occupy any fixed place of residence, but lived in hotels, whether in this country or abroad.

" He was admittedly resident and ordinarily resident in the United Kingdom until December, 1919. He then went abroad, and in each subsequent year he has spent between 7 and 8 months abroad and between 4 and 5 months in the United Kingdom.

" We are satisfied upon the evidence that when he left the United Kingdom in December, 1919, he had formed the intention, which he has consistently carried out ever since, of living abroad for the greater part of the year, but of returning to this country each year and remaining here for considerable periods but not for a period equal in the whole to 6 months in any year.

" The questions for decision are whether he was entitled to exemption from income tax on War Loan interest under section 46 of the Income Tax Act, 1918, as a person not ordinarily resident in the United Kingdom, and on interest on securities of British Possessions under rule 2 (*d*) of the General Rules applicable to Schedule C as a person not resident in the United Kingdom, and the years under review are 1921–22, 1922–23, 1923–24 and 1924–25.

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"These are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom. The claims for the years in question therefore fail."

It is obvious that the conclusions of the Commissioners above quoted are so worded as not to be mere inferences in law from the facts found in the earlier part of the Case, but to be themselves substantive findings of fact; and accordingly under the well established rule those findings cannot be disturbed by the Courts unless there was no evidence to support them. But before dealing with that question I think it desirable to say something about a matter which was much discussed during the argument—namely, the meaning of the word "reside" and the expression "ordinarily reside" as used in the Income Tax Act.

My Lords, the word "reside" is a familiar English word and is defined in the Oxford English Dictionary as meaning "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place." No doubt this definition must for present purposes be taken subject to any modification which may result from the terms of the Income Tax Act and Schedules; but, subject to that observation, it may be accepted as an accurate indication of the meaning of the word "reside." In most cases there is no difficulty in determining where a man has his settled or usual abode, and if that is ascertained he is not the less resident there because from time to time he leaves it for the purpose of business or pleasure. Thus, a master mariner who had his home at Glasgow where his wife and family lived, and to which he returned during the intervals between his sea voyages, was held to reside there, although he actually spent the greater part of the year at sea: *In re Young* (1);

(1) 1 Tax Cas. 57.

Rogers v. *Inland Revenue*. (1) Similarly a person who has his home abroad and visits the United Kingdom from time to time for temporary purposes without setting up an establishment in this country is not considered to be resident here—although if he is the owner of foreign possessions or securities falling within Case IV. or V. of Sch. D, then if he has actually been in the United Kingdom for a period equal in the whole to six months in any year of assessment he may be charged with tax under r. 2 of the Miscellaneous Rules applicable to Sch. D. But a man may reside in more than one place. Just as a man may have two homes—one in London and the other in the country—so he may have a home abroad and a home in the United Kingdom, and in that case he is held to reside in both places and to be chargeable with tax in this country. Thus, in *Cooper* v. *Cadwalader* (2), an American resident in New York who had taken a house in Scotland which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year; and to the same effect is the case of *Loewenstein* v. *de Salis*. (3) The above cases are comparatively simple, but more difficult questions arise when the person sought to be charged has no home or establishment in any country but lives his life in hotels or at the houses of his friends. If such a man spends the whole of the year in hotels in the United Kingdom, then he is held to reside in this country; for it is not necessary for that purpose that he should continue to live in one place in this country but only that he should reside in the United Kingdom. But probably the most difficult case is that of a wanderer who, having no home in any country, spends a part only of his time in hotels in the United Kingdom and the remaining and greater part of his time in hotels abroad. In such cases the question is one of fact and of degree, and must be determined on all the circumstances of the case: *Reid* v. *Inland Revenue Commissioners*. (4) If, for instance, such a man is a foreigner who has never resided in this country,

(1) 1 Tax Cas. 225.
(2) 5 Tax Cas. 101.
(3) 10 Tax Cas. 424.
(4) 1926 S. C. 589; 10 Tax Cas. 673.

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there may be great difficulty in holding that he is resident here. But if he is a British subject the Commissioners are entitled to take into account all the facts of the case, including facts such as those which are referred to in the final paragraph above quoted from the case stated in this instance. Further, the case may be different, and in such a case regard must be had to r. 3 of the General Rules applicable to all the Schedules of the Income Tax Act, which provides that every British subject whose ordinary residence has been in the United Kingdom shall be assessed and charged to tax notwithstanding that at the time the assessment or charge is made he may have left the United Kingdom, if he has so left the United Kingdom for the purpose only of occasional residence abroad.

Turning to the facts of this case, I think it clear that the appellant falls within the category last described. He is a British subject and formerly resided in England. Early in the year 1918 he formed the project of living abroad and thereupon broke up his establishment in this country; but in fact he continued to reside here in hotels until the end of the year 1919. He then went abroad from time to time, but continued to live in hotels either here or in France and he did not actually find a home abroad until the month of January, 1925, when he took a lease of a flat at Monte Carlo. The result is that during the period from the end of 1919 until January, 1925, he went much abroad, partly for the sake of his own and his wife's health, partly no doubt to search for a house or flat, and partly (as may be inferred from the finding of the Commissioners) in the hope of escaping liability to the English income tax; but none of these purposes was more than a temporary purpose, and he regularly returned to England for the greater part of the summer months though for less than one half of each year. On these facts I think that it was plainly open to the Commissioners to find that during the years in question he was resident in the United Kingdom, and I think it probable that r. 3 above quoted applied to him.

It remains to be considered whether during the period in question the appellant "ordinarily resided" in the United Kingdom for the purposes of s. 46 of the Act, and I think that there was material upon which the Commissioners could answer this question in the affirmative. The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression "ordinary residence" is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood the expression differs little in meaning from the word "residence" as used in the Acts; and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here. Upon this point also, as upon the other, I think that the finding of the Commissioners cannot be disturbed.

For these reasons I am of opinion that this appeal fails.

VISCOUNT SUMNER. My Lords, early in 1918 Mr. Levene, a British subject, formed the intention to "live abroad." He sold his house, in Mayfair, sold such furniture as was not in settlement, and then lived in hotels in England for the best part of two years. I will assume that, but for passport difficulties and the condition of his wife's health, he would have gone abroad sooner. He left England in December, 1919.

Accordingly on April 6, 1920, at the beginning of the five years of charge now in question, he was, in the words of r. 3 of the General Rules, "a British subject, whose ordinary residence has been in the United Kingdom" and he remained chargeable to tax notwithstanding, if he had left the United Kingdom for the purpose only of occasional

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residence abroad. Was that the only purpose of his leaving so far as residence is concerned ?

The Special Commissioners found that it was, and I think it is clear that they had evidence before them, on which they could so find. His only declaration was that he meant to live abroad, not saying whether it was to be an occasional or a constant, a part time or a whole time sojourn. He was advised by his doctor to seek a better climate, which is consistent with returning to England when English weather mends. He had gone out of business in England and had broken up his establishment, but he still had in England business interests connected with his income tax assessments, and ties of filial piety and religious observance, for his father was buried at Southampton and he was himself a member of the English community of Jews. What he actually did was to come back to England after an absence of about seven months, and he remained for nearly five. In the meantime he had not set up an establishment abroad but had lived in hotels. This however, was only what he had done in England from March, 1918, to December, 1919. I think there was ample evidence before the Commissioners to show that a man, who left England to live abroad as he had been living here, and when warm weather came returned to his native country and to his permanent associations, had in 1919 "left the United Kingdom for the purpose of occasional residence only." If so, he remained chargeable.

So much for the year of charge 1920–1921. In the following years he was a bird of passage of almost mechanical regularity. No material change occurred in his way of living, for his inquiries for a permanent flat came to nothing until so late as not to affect his life and residence for the period in question.

It is suggested that the Commissioners misdirected themselves in point of law, because they took into account, with regard to the earlier years, conduct, which only occurred subsequently. I agree that the taxpayer's chargeability in each year of charge constitutes a separate issue, even though several years are included in one appeal, but I do not think any error of law is committed if the facts applicable

to the whole of the time are found in one continuous story. Light may be thrown on the purpose, with which the first departure from the United Kingdom took place, by looking at his proceedings in a series of subsequent years. They go to show method and system and so remove doubt, which might be entertained if the years were examined in isolation from one another. The evidence as a whole disclosed that Mr. Levene continued to go to and fro during the years in question, leaving at the beginning of winter and coming back in summer. His home thus remained as before. He changed his sky but not his home. On this I see no error in law in saying of each year, that his purpose in leaving the United Kingdom was occasional residence abroad only. The occasion was the approach of an English winter and when with the promise of summer here that occasion passed away, back came Mr. Levene to attend to the calls of interest, of friendship and of piety. My Lords, for these reasons I think it unnecessary to express, in regard to Mr. Levene's case, any opinion on the question of the tests of residence which are material for income tax purposes or on the meaning of "temporary" in this connection, in cases where a person not within r. 3, comes from abroad to the United Kingdom and remains for a longer or shorter time but not permanently. Of the other conclusions of the Commissioners I say nothing except that, in my opinion, they in no way impair the soundness of their conclusion on r. 3.

I wish, however, to point out the position, in which Mr. Levene and others like him now find themselves. It is trite law that His Majesty's subjects are free, if they can, to make their own arrangements, so that their cases may fall outside the scope of the taxing Acts. They incur no legal penalties and, strictly speaking, no moral censure if, having considered the lines drawn by the Legislature for the imposition of taxes, they make it their business to walk outside them. It seems to follow from this and from other general considerations that the subject ought to be told in statutory and plain terms, when he is chargeable and when he is not. The words "resident in the United Kingdom,"

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whether "ordinarily," or otherwise, and the words "leaving the United Kingdom for the purpose only of occasional residence abroad," simple as they look, guide the subject remarkably little as to the limits, within which he must pay and beyond which he is free. This is the more likely to be a subject of grievance and to provoke a sense of injustice when, as is now the case, the facility of communications, the fluid and restless character of social habits, and the pressure of taxation have made these intricate and doubtful questions of residence important and urgent in a manner undreamt of by Mr. Pitt, Mr. Addington or even Sir Robert Peel. The Legislature has, however, left the language of the Acts substantially as it was in their days nor can I confidently say that the decided cases have always illuminated matters. In substance persons are chargeable or exempt, as the case may be, according as they are deemed by this body of Commissioners or that to be resident or the reverse, whatever resident may mean in the particular circumstances of each case. The tribunal thus provided is neither bound by the findings of other similar tribunals in other cases nor is it open to review, so long as it commits no palpable error of law, and the Legislature practically transfers to it the function of imposing taxes on individuals, since it empowers them in terms so general, that no one can be certainly advised in advance, whether he must pay or can escape payment. The way of taxpayers is hard, and the Legislature does not go out of its way to make it any easier. If it had been possible in this case to apply the principle that a taxing statute must impose a charge in clear terms or fail, since it is to be construed contra proferentem, our duty would have been plain, but since the words are plain and it is only their application that is haphazard and beyond all forecast, Mr. Levene has no remedy in your Lordships' House.

So far as it is permissible to express an opinion on the facts, I think that for the purpose of taxing his Colonial and Indian securities Mr. Levene was at all material times resident in the United Kingdom and, for the purpose of taxing his holding in War Loan, it could not be said of him

that he was not ordinarily resident here. Accordingly in my judgment his appeal fails.

LORD ATKINSON. My Lords, I concur with the judgment of the Lord Chancellor which has just been read by my noble and learned friend Lord Atkin.

LORD WARRINGTON OF CLYFFE. My Lords, the appellant in this case claims relief from income tax for the financial years ending respectively on April 5, 1921, April 5, 1922, April 5, 1923, April 5, 1924, and April 5, 1925.

His claim falls under two heads: (1.) In respect of income payable in the United Kingdom on securities of British possessions, and (2.) in respect of income of British War Loan.

The claim under the first head is based upon r. 2 (*d*) of the General Rules applicable to Sch. C.

"No tax shall be chargeable in respect of the interest or dividends on any securities of . . . . a British possession which are payable in the United Kingdom, where it is proved to the satisfaction of the Commissioners of Inland Revenue that the person owning the securities and entitled to the interest or dividends is not resident in the United Kingdom."

The claim under the second head is based upon s. 46, sub-s. 1, of the Income Tax Act, 1918:—

"Where the Treasury have before the commencement of this Act issued or may thereafter issue any securities which they have power to issue for the purpose of raising any money or any loan, with a condition that the interest thereon shall not be liable to tax or super tax, so long as it is shown, in manner directed by the Treasury, that the securities are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom, the interest of securities issued with such a condition shall be exempt accordingly."

War Loan Stock was issued under the condition mentioned in the section.

In order therefore to support his claims it was incumbent on the appellant to prove that in the one case he was not resident, and that in the other he was not ordinarily resident in the United Kingdom.

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His claims having been rejected by the Commissioners of Inland Revenue he appealed to the Special Commissioners for Income Tax.

They expressed their decision in the following terms :—

"These (viz., the questions they had to decide) are in our opinion questions of degree, and taking into consideration all the facts put before us in regard to the appellant's past and present habits of life, the regularity and length of his visits here, his ties with this country, and his freedom from attachments abroad, we have come to the conclusion that at least until January, 1925, when the appellant took a lease of a flat in Monte Carlo, he continued to be resident in the United Kingdom."

It will be observed that they do not in express terms state that he continued to be ordinarily resident here, but, from the terms in which they state the questions they had to decide, it is clear that the decision was intended to cover both cases.

At the request of the appellant the Commissioners stated a case for the opinion of the High Court. The case came before Rowlatt J. on July 23, 1926, who affirmed the decision of the Commissioners and dismissed the appeal.

An appeal to the Court of Appeal was dismissed by an order dated March 16, 1927.

It is not quite clear whether the Commissioners intended their decision to be a finding of fact or a conclusion of law. If it were the former there is at least ground for saying that it was not open to appeal, but as the case was argued in both Courts below and in this House upon its merits, I think I ought to state shortly my reasons for thinking the decision was correct.

The appellant is a British subject. Down to March, 1918, he had a permanent home in London. In that month he sold his furniture and in April he surrendered the lease of his house. He continued, however, to live in England in various hotels until December, 1919. So far there is no question that he was both resident and ordinarily resident in the United Kingdom.

He is married but has no children. His family ties are in this country, his wife having five sisters and he himself six brothers and sisters residing here.

Apparently under medical advice to the effect that he and his wife should live in the South of France and avoid the United Kingdom in the winter months, he and his wife, in December, 1919, went abroad. They returned to this country on July 10, 1920. From that day until November 24, 1920, they remained in England. They then again went abroad until July 2, 1921, when they returned here and stayed until November 27. They then went abroad. On April 9, 1922, they returned to England, where they stayed until June 18. They were abroad until September 10. From that day until November 19 they stayed here. They then went abroad and remained there until April 12, 1923. On that day they returned and stayed in this country until June 27. They then went abroad, returning on September 10 and staying here until November 15. They were abroad from that day till April 10, 1924, when they returned here and stayed until July 1. From that day until September 10 they were abroad. They then returned and stayed until November 23, when they again went abroad. In no year of assessment did their stay here extend to six calendar months. While abroad they had no settled home, but lived in hotels at Monaco and at various places in France. In England also they lived in hotels. The appellant states that he intended throughout to live abroad, but his intention does not appear to have been of a very pressing character, for, though he made in the course of the years 1922 to 1924 endeavours to find a suitable flat he did not succeed until January, 1925. Since he gave up his house in 1918 he has had no intention of again taking a house or flat in the United Kingdom. He stated to the Commissioners various reasons for his visits to England—to obtain medical advice—to visit relatives—to take part in certain Jewish religious observances —to visit the graves of his parents—to deal with his income tax affairs.

These being the facts, the question is whether the

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Commissioners, the King's Bench Division and the Court of Appeal were wrong in the conclusion at which they respectively arrived.

I do not attempt to give any definition of the word "resident." In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. "Ordinarily resident" also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered.

In the present case, taking the several years of assessment in succession, in that ending April 5, 1921, there is no substantial difference between the nature of his residence abroad and that of his residence here except that the former was for a longer period. He did in fact, what many wealthy people do at the present time, he spent the winter and spring, and in this particular instance the early summer, abroad and the rest of the summer and the autumn here again going abroad for the winter. In the year ending April 5, 1922, there was no substantial change, but in those ending April 5, 1923, and April 5, 1924, we find a change to this extent, that he now returns to this country in April, goes abroad for the usual summer holiday, and returns to this country till the winter season comes round again. I will assume that, for the purpose of determining whether in any year he is ordinarily resident, the usual ordering of his life must be judged by what he does in that and preceding years only, still in the first year the circumstances show that the stay in England was as much in the ordinary course as his previous residence, and in subsequent years he developed habits of periodical changes of abode, each one of which may be said to be in accordance with the usual ordering of his life.

I have not thought it necessary to rest my opinion upon the third of the General Rules applicable to All Schedules, but

it is difficult to see any answer to the case of the respondents under it. The appellant is a British subject, his ordinary residence was unquestionably in the United Kingdom until December, 1919, and I fail to see that his subsequent departure from the United Kingdom in any of the years in question was otherwise than for the purpose of occasional residence abroad.

Rule 2 of the Miscellaneous Rules applicable to Sch. D has no direct application to this case, which is under Sch. C, and I do not see that it throws any light on the two questions which here arise for decision.

In conclusion I desire, as far as I am concerned, to leave open the question whether the appellant's position has been altered by the acquisition in January, 1925, of a flat in Monte Carlo as his settled residence there.

On the whole I am of opinion that the appeal fails and ought to be dismissed with costs.

VISCOUNT SUMNER. My Lords, I am asked to say that my noble and learned friend, Lord Buckmaster, concurs with the motion I am about to propose.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 9, 1928.

Solicitor for the appellants: *M. A. Jacobs.*
Solicitor for the respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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COMMISSIONERS OF INLAND REVENUE APPELLANTS;

AND

LYSAGHT . . . . . RESPONDENT,

Revenue—Income Tax—Residence in United Kingdom—Ordinary Residence —Question of Fact or Law—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 46, *sub-s.* 1—*General Rules applicable to Sch. C, r.* 2 (*d*).

The respondent was born in England of Irish parents. Up to 1919 he was resident in England, where he lived with his family, and was the managing director of an English company. In 1919 he partially retired from the business and went to live permanently with his family in the Irish Free State. He continued, however, to retain the post of advisory director of the company. After 1919 he had no definite place of abode in England, but he came to England for a meeting of the directors every month, and remained in England for about a week for consultations with the other directors in connection with the company's business. When in England he usually stayed at a hotel. His visits to England were solely for business purposes, and his wife never accompanied him. He had no business interests in Ireland except the management of his estate. His banking account was kept in Ireland, but he had a small account in England. The respondent claimed exemption from income tax on British War Loan under s. 46 of the Income Tax Act, 1918, and repayment of income tax on Foreign and Dominion Government securities under r. 2 (*d*) of the General Rules applicable to Sch. C of the same Act in respect of the two fiscal years ending April 5, 1923, and April 5, 1924, respectively. The Special Commissioners held that the respondent was both "ordinarily resident" and "resident" in the United Kingdom for each of the two years in question, and that the claim failed:—

Held (by Viscount Sumner, Lord Atkinson, Lord Buckmaster and Lord Warrington of Clyffe; Viscount Cave L.C. dissenting), that the conclusion of the Commissioners was a finding of fact and that there was evidence upon which they could properly arrive at that conclusion.

Held, by the Lord Chancellor, dissenting, that the conclusion of the Commissioners was a mixed finding of fact and law, and that, assuming it to be a finding of fact, there was no evidence upon which that finding could properly be based.

No special or technical meaning is attached to the terms "resident" and "ordinarily resident" as used in the Income Tax Act, 1918; accordingly the question whether a person is "resident" and "ordinarily resident" in the United Kingdom for the purposes of the Act is essentially a question of fact for the Commissioners.

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* *Present:* VISCOUNT CAVE L.C., VISCOUNT SUMNER, LORD ATKINSON, LORD BUCKMASTER, and LORD WARRINGTON OF CLYFFE.

A person is ordinarily resident in a country for income tax purposes if his residence there is not casual or uncertain but is in the ordinary course of his life.

Decision of the Court of Appeal [1927] 2 K. B. 55 reversed.

APPEAL from an order of the Court of Appeal (1) (Lord Hanworth M.R. and Sargant L.J.; Lawrence L.J. dissenting), reversing an order of Rowlatt J., who affirmed the decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The facts are fully set out in the report of the case before Rowlatt J. and the Court of Appeal and sufficiently appear from the opinion of the Lord Chancellor, and they are summarized in the headnote.

1928. Jan. 27, 30. *Sir Douglas Hogg A.-G.* and *Sir Thomas Inskip S.-G.* (with them *Reginald Hills*) for the appellants. Whether or not a man resides in a particular country in a particular year when he is there for a certain time is a question of degree, and that is pre-eminently a question of fact for the Commissioners: *Bayard Brown* v. *Burt* (2); *Pickles* v. *Foulsham* (3); *Thomson* v. *Inland Revenue Commissioners* (4); *Reid* v. *Inland Revenue Commissioners* (5); *Smith* v. *Lion Brewery Co.* (6); *Malcolm* v. *Lockhart* (7); *Currie* v. *Inland Revenue Commissioners* (8); *Cooper* v. *Stubbs* (9); *New Zealand Shipping Co.* v. *Thew* (10); *Clerkenwell Vestry* v. *Edmondson & Son.* (11) There is no test of residence which anybody could devise, except to say that the Commissioners must look at all the facts and draw from them the inference of fact that the subject either does or does not reside here. Here there are facts from which the Commissioners were entitled to draw the inference which they did. A man does not the less reside in a place because

(1) [1927] 2 K. B. 55.
(2) (1911) 5 Tax Cas. 667, 670, 673.
(3) (1925) 9 Tax Cas. 261, 274.
(4) (1918) 56 S. L. R. 10, 13.
(5) 1926 S. C. 589, 594, 596.
(6) [1911] A. C. 150, 156.
(7) [1919] A. C. 463, 466.
(8) [1921] 2 K. B. 332, 335–6, 338, 343.
(9) [1925] 2 K. B. 753, 772.
(10) (1922) 8 Tax Cas. 208.
(11) [1902] 1 K. B. 336, 339.

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he spends the time there for business reasons. The onus is on the subject to prove non-residence and the respondent cannot establish his claim unless he can show that there was no evidence on which the Commissioners could reasonably find as they did. Then as to "ordinarily resident." That does not mean preponderatingly. That view has been negatived by the Court of Appeal in *Levene's* case. (1) A man is ordinarily resident in a place if he resides there in pursuance of his regular habits of life. Accordingly there is no physical impossibility in saying that a man ordinarily resides in two places: *Lloyd* v. *Sulley* (2); *Cooper* v. *Cadwalader* (3); *Reid* v. *Inland Revenue Commissioners* (4); *In re Norris* (5); *Pittar* v. *Richardson* (6); *Byrne* v. *Hedges*. (7)

The question whether the respondent was ordinarily resident in the United Kingdom is, like the question whether he was resident there, a question of degree and fact and, there being evidence to support the findings of the Commissioners on both these questions, they cannot be disturbed.

Latter K.C. (with him *Stephen Benson*) for the respondent. "Residence" is a word of varying meaning and has to be construed according to the intent and object of the statute in which it occurs: *Blackwell* v. *England* (8); *Powell* v. *Guest* (9); *Ex parte Breull*. (10) The question in this case is therefore not a question of pure fact, but a question of law or of mixed fact and law, and the decision of the Commissioners did not purport to be a finding of fact. It is therefore open to review. It is not necessary to lay down a legal definition of the term under consideration in order to make the question of its meaning a question of law. In *Great Western Ry. Co.* v. *Bater* (11), where the question was whether a railway clerk held a public office or employment of profit, the Court of Appeal said that the question was one of fact

(1) [1927] 2 K. B. 38; affirmed p. 217, ante.
(2) (1884) 2 Tax Cas. 37, 45.
(3) (1904) 5 Tax Cas. 101, 109.
(4) 1926 S. C. 589, 595.
(5) (1888) 4 Times L. R. 452.
(6) (1917) 87 L. J. (K. B.) 59.
(7) (1918) 87 L. J. (K. B.) 831, 832.
(8) (1857) 8 E. & B. 541, 547.
(9) (1864) 18 C. B. (N. S.) 72, 80.
(10) (1880) 16 Ch. D. 484, 486–7.
(11) [1921] 2 K. B. 128, 136, 141; [1922] 2 A. C. 1, 13, 27, 30.

for the Commissioners, but this House said the opposite. All your Lordships treated the question as one of law or of mixed law and fact. In *Farmer* v. *Cotton's Trustees* (1) Lord Parker said that, where all the material facts were found and the only question was whether the facts were such as to bring the case within the provisions of some statutory enactment, the question was one of law only: see also *Gas Lighting Improvement Co.* v. *Inland Revenue Commissioners* (2); *Smidth & Co.* v. *Greenwood.* (3) As to ordinary residence, the authorities show that a man is ordinarily resident in a country if he resides there in the ordinary course of his life. Sect. 27 of the Finance Act, 1924, by giving a right of appeal on any question of residence or ordinary residence, contemplated that the decision of such questions by the Commissioners raised a point of law and was therefore not final. All the members of the Court of Appeal have treated these questions as questions of law. Assuming that they are questions of fact, there was no evidence to support the findings of the Commissioners. A man who has his home out of the United Kingdom and comes here solely for the purpose of attending directors' meetings is here for a temporary purpose only and not with any view of establishing his residence here. The facts of the case are inconsistent with the conclusion that the respondent was either "resident" or "ordinarily resident" in this country.

Sir Douglas Hogg A.-G. in reply. Of course the Income Tax Act must be looked at to see whether the terms "resident" and "ordinarily resident" have any special or technical meaning attached to them, but here the words are used in their ordinary sense.

The House took time for consideration.

1928. Mar. 9. VISCOUNT CAVE L.C. (read by LORD WARRINGTON OF CLYFFE). My Lords, the facts in this case as found by the Special Commissioners may be very shortly stated. The respondent, Mr. S. R. Lysaght, who was born

(1) [1915] A. C. 922, 932. (2) [1923] A. C. 723, 728.
(3) [1921] 3 K. B. 583, 590.

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in England of Irish parents, was formerly the managing director of a company called John Lysaght, Ld., which has works at Bristol and Newport, and while he was so engaged owned a property near Bristol and resided there with his family. In the year 1919 he partially retired from the business but was appointed an advisory director. Thereupon he sold his property near Bristol and went to live on a family property at Mallow in Ireland which he had purchased in the year 1916, and from that time he has had no definite place of abode in this country, but he comes to England from time to time in circumstances detailed in the following paragraphs from the case stated by the Commissioners :—

"(4.) The appellant comes to England for a meeting of the directors of John Lysaght, Limited, every month and remains for consultations with the other directors and for committee meetings. The company have a branch business at Scunthorpe, Lincs., and the appellant has visited this business on several occasions during his visits to England. On the occasion of these visits he spends about a week in England. On two occasions his return to Ireland was delayed by illness. The total number of days spent in England in the respective years has been as follows :—

	Days.
In the year ended the 5th April, 1923 . .	101
In the year ended the 5th April, 1924 . .	94
In the year ended the 5th April, 1925 . .	84
In the period from 6th April till 25th September, 1925	48

When in England the appellant generally stays at the Spa Hotel, Bath, at which the meetings of the directors of the company are held. Occasionally he has stayed at his brother's house at Chepstow. These visits to England are solely for business purposes, and the appellant's wife never accompanies him on these visits. He owns a field of about three acres near Burnham, purchased many years ago, which he is anxious to sell. He has a few relatives and many friends in England. He has also relatives and friends abroad.

(5.) He has no business activities in Ireland except the management of his estate at Mallow, of which 800 acres are in hand.

(6.) His banking account is at the Mallow branch of the Bank of Ireland, but he has also a small account at a branch in Bristol of the Westminster Bank. The registered address of his various securities is 'Hazelwood,' Mallow. He is a member of the Saville Club, London, but hardly ever goes there. During the past five years he has made three lengthy trips to Australia and South America on behalf of the company."

The respondent, having been assessed by the General Commissioners to income tax in respect of the tax years 1922–3 and 1923–4 in respect of income from foreign and colonial Government securities and War Loan, claimed exemption from tax under r. 2 (*d*) of the General Rules applicable to Sch. C of the Income Tax Act and s. 46, sub-s. 1 of the same Act on the ground that during the years in question he was neither resident nor ordinarily resident in the United Kingdom; but the claim was disallowed, and on appeal to the Special Commissioners they confirmed the decision of the General Commissioners subject to a case stated for the opinion of the High Court. After stating the facts and the contentions of the parties, the case proceeds as follows: "We held that the appellant was both ordinarily resident and resident in the United Kingdom for each of the two years ended the 5th April, 1923, and the 5th April, 1924, respectively."

On the case being argued, Rowlatt J. refused to disturb the Commissioners' decision, but the Court of Appeal (by a majority) took a different view. The Crown now appeals to this House.

My Lords, this case differs in an essential respect from the case of *Levene* v. *Inland Revenue Commissioners* (1), which your Lordships have just decided. In that case the appellant, Mr. Levene, was during the period in question a homeless man living at different hotels in the United Kingdom and abroad. In the present case the respondent, Mr. Lysaght,

(1) Ante, p. 217.

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has a permanent home in Southern Ireland, where he lives with his family; but he comes to England once a month for business purposes, stays at an hotel and, when his business (which usually occupies about a week) is concluded, he returns home. It is unnecessary for me to repeat the observations which I have made in the previous case as to the meaning of the expressions "reside" and "ordinarily reside"; and it is enough to say that, on the view which in that case I have taken as the meaning of those expressions, there appears to me to be no reason whatever for holding that the respondent is resident or ordinarily resident in this country. It is true that he comes here at regular intervals and for recurrent business purposes; but these facts, while they explain the frequency of his visits, do not make them more than temporary visits or give them the character of residence in this country. That he has a small account at a bank in Bristol—doubtless for use during his visits to this country—and a club in London to which he hardly ever goes, appear to me to be trivial circumstances which cannot affect the decision. If the respondent is held to reside here and to be taxable accordingly, there would appear to be no reason why those many foreigners who periodically visit this country for business purposes, and having concluded their business go away, should not be made subject to a like burden.

But it was argued—and this was the point mainly insisted upon on behalf of the Crown—that the conclusion of the Special Commissioners that the respondent was both resident and ordinarily resident in the United Kingdom was a finding of pure fact, and accordingly could not be disturbed by the Court of Appeal. No doubt the rule is well established that a finding of the Commissioners on a question of pure fact cannot be reviewed by the Courts except on the ground that there was no evidence on which the Commissioners could as reasonable men have come to their conclusion, and this although the Court of review would, on the evidence, have come to a different conclusion. But it does not appear to me that the conclusion of the Commissioners in the present

case was a finding of pure fact. It is true, as Rowlatt J. said in *Pickles* v. *Foulsham* (1), that where a man resides is a question of fact to be determined on proper legal principles; and it is true also, as he said in the same case, that when you get a case on the border line, i.e., where there is evidence both ways which is nearly balanced—it becomes very essentially a question of fact. A good instance of this is the case of *Levene* (2) to which I have referred. But, as Lord Parker said in *Farmer* v. *Cotton's Trustees* (3) it is not always easy to distinguish between questions of fact and questions of law for the purposes of the Taxing Acts; and I venture to express my concurrence with the protest made by Lord Atkinson in *Great Western Ry. Co.* v. *Bater* (4), against the attempt which is often made to secure for a finding on a mixed question of law and fact the unassailability which belongs only to a finding on a question of pure fact. In the present case the Commissioners appear to me to have so framed their case as to prevent (if possible) any confusion of that kind. They have carefully and fully stated all the material facts found by them to exist and then, after setting out the rival contentions of the parties (some of them being contentions of law), they have "held" that the appellant was both ordinarily resident and resident in the United Kingdom in the years in question. This seems to me to mean on the facts already found by them and on their view of the law they were prepared to draw the inference of residence. In short, it is a mixed finding of fact and law; and unless such a finding is open to review by the Courts little benefit will accrue to the subject from the right which is given to him to have a case stated for the opinion of the King's Bench Division. In my opinion this argument fails.

I feel compelled to add that, if the Commissioners' decision is to be taken as a finding on the facts only, then it appears to me that there was on their own showing no evidence upon which that finding could properly be based.

For these reasons I would dismiss this appeal.

(1) 9 Tax Cas. 261, 274.
(2) Ante, p. 217.
(3) [1915] A. C. 922, 932.
(4) [1922] 2 A. C. 1, 12.

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VISCOUNT SUMNER. My Lords, what has to be decided in this case is really the meaning of the word "resident" in the Income Tax Act, 1918, and the mode, in which that meaning is to be settled in particular cases. The respondent, who lives in the Irish Free State, claimed exemption from tax, as to some of his securities because he was "not ordinarily resident in the United Kingdom" within s. 46, sub-s. 1, and as to others because he was not "resident in the United Kingdom" within the General Rules applicable to Sch. C No. 2 (*d*). The Commissioners for Special Purposes decided against him in both cases. Sect. 46, sub-s. 1, provides that the non-residence there mentioned is to be shown "in manner directed by the Treasury," while r. 2 (*d*) of the General Rules exempts a taxpayer for non-residence "where it is proved to the satisfaction of the Commissioners of Inland Revenue," but no distinction has been drawn nor has any point been taken on this ground.

There is, however, a preliminary question on the form of the Commissioners' decision. Their case stated is framed thus :—

"2. The following facts were admitted or proved in evidence. . . . .

3. It was contended by the appellant. . . . .

4. It was contended on behalf of the Crown. . . . .

5. We held that the appellant was both ordinarily resident and resident in the United Kingdom. . . . ."

Para. 2 sets out under six heads the circumstances of various kinds relevant to the issue of Mr. Lysaght's way of life and particularly of his visits to England. It was contended that this paragraph and this alone stated the facts found by the Commissioners and that para. 5 found no fact but only stated their opinion of the consequences in law, which followed from their previous finding. In that case, if residence, ordinary or otherwise, is a question of fact the case must have gone back to be completely stated ; if it is purely a question of law, the whole case would be open for your Lordships' decision as to the consequences legally arising from the facts found.

It is certainly much to be wished that the Commissioners should be scrupulously careful to say that they "find" a conclusion of fact, arrived at from other facts found, or, if they only mean to apply the law as they understand it to be and not to draw any conclusion of fact, should say, that they "hold" so and so in accordance with what they conceive to be the law, for a debate on the meaning of a case stated is an unsatisfactory prelude to a debate on the general law applicable. I have, however, no doubt as to the Commissioners' meaning here. Their experience makes them fully conversant with the wide scope of their functions and with their limits and it is most unlikely that they intended to leave unfound the ultimate fact of residence, which was the substance of the whole case before them. It is as though a jury, fully directed by the trial judge, had found a special verdict stating the points, which the evidence had proved to their satisfaction, and had concluded "we hold this to have been careless and unreasonable conduct on the defendant's part and we find for the plaintiff."

It is well settled that, when the Commissioners have thus ascertained the facts of the case and then have found the conclusion of fact which the facts prove, their decision is not open to review, provided (*a*) that they had before them evidence, from which such a conclusion could properly be drawn, and (*b*) that they did not misdirect themselves in law in any of the forms of legal error, which amount to misdirection.

My Lords, the word "ordinarily" may be taken first. The Act on the one hand does not say "usually" or "most of the time" or "exclusively" or "principally" nor does it say on the other hand "occasionally" or "exceptionally" or "now and then," though in various sections it applies to the word "resident," with a full sense of choice, adverbs like "temporarily" and "actually." I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary." Having regard to the times and duration, the objects and the obligations

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of Mr. Lysaght's visits to England, there was in my opinion evidence to support, and no rule of law to prevent, a finding, that he was ordinarily resident, if he was resident in the United Kingdom at all. No authority was cited requiring special consideration on this head.

Grammatically the word " resident " indicates a quality of the person charged and is not descriptive of his property, real or personal. To ask where he has his residence is often a convenient form of inquiry but only as leading to the question " then where is he resident himself ? " I think this distinction, though often pointed out, has too often been overlooked in the arguments in the reported cases. No doubt, on the authority of the merchant seamen's cases, Mallow was Mr. Lysaght's home and he resided there. There were his family seat and his demesne lands, his wife and family, his farming and his sport, and, though some people may be able to make themselves at home from home anywhere, I do not suppose that the Spa Hotel, Bath, however excellent, was much of a home to Mr. Lysaght. This, however, is not conclusive. Who in New York would have said of Mr. Cadwalader " his home's in the Highlands ; his home is not here " ? After all, many nomads are homeless folk, though they may reside continually, here or there, within the limits of the United Kingdom. Property obviously is no conclusive test. Whether Mr. Lysaght resides in his own or in a hired house in Ireland cannot have much to do with it, nor is a person precluded from being resident, because he puts up at hotels, and not always the same hotel, and never for long together. It was said in *Cadwalader's* case (1) that an establishment was set up in the United Kingdom. None was set up here and in fact Mr. Lysaght had closed his English establishment some years before, but although setting up an establishment in this country, available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master to be " resident " here, it does not follow that keeping up an establishment abroad and none here is incompatible

(1) 5 Tax Cas. 101.

with being " resident here," if there is other sufficient evidence of it. One thinks of a man's settled and usual place of abode as his residence, but the truth is that in many cases in ordinary speech one residence at a time is the underlying assumption and, though a man may be the occupier of two houses, he is thought of as only resident in the one he lives in at the time in question. For income tax purposes such meanings are misleading. Residence here may be multiple and manifold. A man is taxed where he resides. I might almost say he resides wherever he can be taxed.

There is again the circumstance that Mr. Lysaght only comes over for short visits. Does this make any conclusive difference ? If he came for the first three months in the year for the purpose of his duties and then returned home till the next year, would there not be evidence that he was resident here, and, if so, how does the discontinuity of the days prevent him from being resident in England when he is here in fact, if the obligation to come, as required, is continuous and the sequence of the visits excludes the elements of chance and of occasion. If the question had been one of " occasional residence " abroad in the language of General Rule 3 these facts would have satisfied the expression, for residence is still residence, though it is only occasional, and I see no such fundamental antithesis between " residence " and " temporary visits " as would prevent Mr. Lysaght's visits, periodic and short as they are, from constituting a residence in the United Kingdom, which is " ordinary " under the circumstances.

My Lords, I think it is the shortness of the aggregate time during which Mr. Lysaght is here, that constitutes the principal, though by no means the only point in his favour, but the question of a longer or a shorter time, like other questions of degree, is one peculiarly for the Commissioners. I do not say that time might not be so short, or again so long, as to make it right to hold, no matter what other evidence there was, that, as the case might be, there was either no evidence of residence or that the evidence was all one way in favour of it, but these questions are not before us.

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Viscount Sumner.

It is attractive to say, as in substance was the opinion of the Court of Appeal, that "resident" in this case is a matter of law, as being a matter of interpretation, but that does not cover the ground. Interpretation only says what the Act itself refrains from telling us—namely, the meaning of the word "resident"—but, as that meaning is its meaning in the speech of plain men, the question still remains, whether plain men would find that the result of the facts found was "residence" in its plain sense, and I do not doubt that the Commissioners understood the word not otherwise than in its correct legal signification and so applied it. Accordingly I do not think that their decision can be interfered with.

It remains to notice an argument founded on the Finance Act, 1924, s. 27. This section provides that, in the case of questions as to "ordinary residence" under s. 46, sub-s. 1, of the Income Tax Act, 1918, or as to "residence" in r. 2 (*d*) of the General Rules applicable to Sch. C, a person aggrieved by the decision of the Commissioners of Inland Revenue can apply to have his claim for relief determined by the Special Commissioners, who are to proceed as on an appeal against an assessment under Sch. D, subject to all the provisions of the Income Tax Acts relating to such an appeal. This was what Mr. Lysaght did, and the section is supposed to show, that "residence" and "ordinary" residence are questions of law. I do not think that it does. It only shows that they are questions which the Special Commissioners are competent to review, leaving the distinction between questions of law and questions of fact untouched. True the Special Commissioners can state a special case for the opinion of the High Court on a question of law, but the section does not say that "residence" and "ordinary" residence in themselves are such questions of law and it is only on such questions as may arise, if any, that the case can be stated. The Commissioners are not required to find out or to formulate such questions. If, as here, they say, "The appellant immediately upon the determination of the appeal declared to us his dissatisfaction therewith, as being erroneous in point of law, and in due course required us to state a case . . . .

which case is here stated," they have done their duty, and it is open to your Lordships to say that, not having misdirected themselves in point of law and not having proceeded without evidence on which they could properly find as they have found, their determination is not erroneous in point of law. This satisfies the section. It does not say, expressly or by implication, that "resident," whether "ordinarily" or otherwise, raises a question of law in itself.

LORD ATKINSON. My Lords, I am about to read the judgment of my noble and learned friend Lord Buckmaster, who is engaged elsewhere, and I concur in that judgment.

LORD BUCKMASTER (read by LORD ATKINSON). My Lords, the real question that arises in this case is whether the finding of the Commissioners that the respondent was resident and ordinarily resident in England is a finding of fact which cannot be disturbed, or whether it is open to examine the circumstances set out by the Commissioners for the purpose of seeing whether the conclusion they drew is one that this House will accept. The distinction between questions of fact and questions of law is difficult to define, but according to the respondent whether a man is resident or ordinarily resident here must always be a question of law dependent upon the legal construction to be placed upon the provisions of an Act of Parliament. I find myself unable to accept this view. It may be true that the word "reside" or "residence" in other Acts may have special meanings, but in the Income Tax Acts it is, I think, used in its common sense and it is essentially a question of fact whether a man does or does not comply with its meaning.

It is, of course, true that if the circumstances found by the Commissioners in the special case are incapable of constituting residence their conclusion cannot be protected by saying that it is a conclusion of fact since there are no materials upon which that conclusion could depend. But if the incidents relating to visits in this country are of such a nature that they might constitute residence and their

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prolonged or repeated repetition would certainly produce that result then the matter must be a matter of degree, and the determination of whether or not the degree extends so far as to make a man resident or ordinarily resident here is for the Commissioners and it is not for the Courts to say whether they would have reached the same conclusion. This case is an excellent illustration of this particular point. The appellant's home is in Ireland, he has no definite place of abode in England, and the circumstances in which he comes to this country and the periods during which he remains have already been stated.

It could not, I think, be denied that, even although the respondent had his home in Ireland, his sojourn in this country in the circumstances and for the purposes found by the Commissioners might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the object of his visits sufficient to show that he could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities of his position in relation to the company of John Lysaght, Ld., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the Commissioners to find that in fact he does so reside, and if residence be once established ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.

LORD WARRINGTON OF CLYFFE. My Lords, this case raises under different circumstances the same questions as those raised in *Levene's* case (1) just decided by your Lordships' House—namely, whether the respondent (as he is in this case) was in either of the years of assessment—namely, 1922–23 and 1923–24 resident and ordinarily resident in the United Kingdom.

The respondent was entitled to certain securities of British possessions the interest on which was payable in the United Kingdom and to British War Loan stock issued with the condition mentioned in s. 46 of the Income Tax Act, 1918.

Having been assessed to income tax on both classes of security he appealed to the Special Commissioners, who decided that he was resident in the case of one class, and was ordinarily resident in the case of the other.

A case was thereupon stated by the Commissioners for the opinion of the High Court. The case was heard before Rowlatt J. who affirmed the decision of the Commissioners. The respondent appealed to the Court of Appeal who by a majority (Lord Hanworth M.R. and Sargant L.J.; Lawrence L.J. dissenting) allowed the appeal and set aside the judgment of Rowlatt J. and the decision of the Commissioners, being of opinion that the respondent was not at the material times either resident or ordinarily resident in the United Kingdom.

The argument of the Attorney-General in this House was rested exclusively on the contention that the questions to be determined are both questions of degree and therefore of fact and that there was on each question evidence on which the Commissioners might reasonably come to the conclusion at which they arrived, and consequently their decision was not subject to review.

I have reluctantly come to the conclusion that it is now settled by authority that the question of residence or ordinary residence is one of degree, that there is no technical or special meaning attached to either expression for the purposes of the Income Tax Act, and accordingly a decision of the

(1) Ante, p. 217.

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Commissioners on the question is a finding of fact and cannot be reviewed unless it is made out to be based on some error in law, including the absence of evidence on which such a decision could properly be founded.

In *Bayard Brown* v. *Burt* (1) Hamilton J., after mentioning the finding of the Commissioners, that the appellant was resident in the United Kingdom said: "That only raises a question of law, if it can be contended that it is impossible to draw that conclusion of fact as to residence in the United Kingdom from the facts set out in the case." This view was affirmed in the Court of Appeal. The same view was expressed by Rowlatt J. in *Pickles* v. *Foulsham*. (2) The point was not raised in the Court of Appeal.

In *Reid* v. *Inland Revenue Commissioners* (3) (a Scotch case), the Lord President (Lord Clyde) said: "It is obvious that the more general and wide the scope of expressions used in a statute, the more difficult it may become to convict those whose duty it is to interpret it of an error or misdirection in applying it to a given state of facts. It may be possible in such cases to predicate of a particular state of facts that they lie outside the scope of the expressions used, although it may be really an impossible task to define that scope positively and with exact accuracy. The expression 'resident in the United Kingdom' and the qualification of that expression implied in the word 'ordinarily' so resident are just about as wide and general and difficult to define with positive precision as any that could have been used. The result is to make the question of law become (as it were) so attenuated, and the field occupied by the questions of fact become so enlarged, as to make it difficult to say that a decision arrived at by the Commissioners, with respect to a particular state of facts held proved by them, is wrong."

In the same case Lord Sands said: "When a statute uses ordinary non-technical language describing a person or thing in general or ambulatory terms, and it becomes merely a matter of impression or opinion whether, in relation to the

(1) 5 Tax Cas. 667, 670.
(2) 9 Tax Cas. 261, 275.
(3) 1926 S. C. 589, 594, 596; 10 Tax Cas. 673, 678, 681.

special circumstances, a person or thing falls within the expression, the tendency of the law is to treat a finding upon the matter as a finding of fact." He concurred in refusing to disturb the determination of the Commissioners, though he was not sure that he would have been prepared to differ had they decided the other way.

See also the opinion of Lord Halsbury in *Smith* v. *Lion Brewery Co.* (1) and that of Lord Buckmaster in *Malcolm* v. *Lockhart* (2) and my own remarks in the Court of Appeal in *Cooper* v. *Stubbs.* (3)

In the present case, after stating that certain facts set forth in detail were either admitted or proved, the Commissioners " held " that the present respondent was both ordinarily resident and resident in the United Kingdom for each of the two years in question.

The most material fact in the present case in favour of a finding contrary to that of the Commissioners was that the respondent had a permanent family home in Southern Ireland. His visits to this country were for business purposes as advisory director of John Lysaght, Ld., of which he had previously been director and managing director; they were frequent and regular and the number of days spent in this country in the two years in question was 101 and 94 respectively,

I cannot say that there was no evidence on which the Commissioners could properly arrive at their conclusion though I am not sure I should have taken the same view.

I think the appeal ought to be allowed with costs here and below and the judgment of Rowlatt J. restored.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The respondent to repay to the appellants the costs of the hearing in the Court of Appeal paid to the respondent by the appellants under the order of the Court of Appeal. By consent, no order as

(1) [1911] A. C. 150, 156. (2) [1919] A. C. 463, 466.
(3) [1925] 2 K. B. 753, 772.

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to the costs of the appeal to this House except that the costs be taxed. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, March 9, 1928.

Solicitor for the appellants: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Whites & Co., for Clarke, Sons & Press, Bristol.*

[HOUSE OF LORDS,]

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COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

COUNTESS OF LONGFORD . . . . RESPONDENT.

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

PAKENHAM AND OTHERS . . . . . RESPONDENTS.

Revenue—Super-tax—Assessment—Representative Assessments on Trustees and on Guardian—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 41—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 72, *sub-s.* 6—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 7, *sub-s.* 6, *General Rules applicable to All Schedules, r.* 4.

Sect. 41 of the Income Tax Act, 1842, and r. 4 of the General Rules applicable to All Schedules under the Income Tax Act, 1918, are not applicable to assessments to super-tax within s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, or s. 7, sub-s. 6, of the Income Tax Act, 1918; accordingly representative assessments to super-tax cannot be made upon the trustees or guardian of an infant beneficiary, either in respect of the actual total income of the infant or in respect of the total income limited, as regards the particular trustees or guardian, to the income with which the trust or guardianship is concerned.

Decision of the Court of Appeal [1928] 1 K. B. 118 affirmed.

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* *Present:* LORD BUCKMASTER, VISCOUNT SUMNER, LORD WRENBURY, LORD CARSON, and LORD WARRINGTON OF CLYFFE.

APPEALS from decisions of the Court of Appeal (1), affirming decisions of Rowlatt J. (2), upon cases stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The question raised by the appeal was whether an infant beneficiary, whose income was admittedly liable to super-tax, could be assessed to that tax (*a*) in the name of his guardian, or (*b*) in the name of his trustees.

The Earl of Longford was born in December, 1902.

On the death of his father in August, 1915, the Earl became legal tenant in tail of the property comprised in a settlement dated in August, 1899. The respondents in the second appeal were the trustees of this settlement, and trustees for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881. The settled property consisted partly of land in Ireland, and partly of personalty representing the proceeds of sales of land in Ireland. Thereafter these trustees, during the minority of the Earl, paid to his mother, the Countess, the respondent in the first appeal, the yearly sum of 2500*l.* for his maintenance. Following on the failure of the Countess to comply with a request to make a return of the total income of the Earl for the year ending on April 5, 1917, the Commissioners assessed her, as the guardian of the Earl, to super-tax for that year in the sum of 12,000*l.*

On an appeal against that assessment the Commissioners held that the Countess was not liable to be assessed to super-tax in respect of any income of the Earl which did not pass through her hands, and, as the income so passing was below the limit of total income on which super-tax was then payable, the assessment was discharged.

Rowlatt J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal (Lord Hanworth M.R., Scrutton and Sargant L.JJ.).

On the death of the Earl's grandmother, the Dowager Countess of Longford, in January, 1918, the Earl became legal tenant in tail of the property comprised in a settlement dated in November, 1862. The settled property

(1) [1928] 1 K. B. 118. (2) [1927] 1 K. B. 594.

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consisted of land in Bedfordshire. Thereafter the trustees of this settlement, who were not parties to these proceedings, paid to the Countess, during the minority of the Earl, the yearly sum of 500*l.* for his maintenance, thus bringing up the total annual sum for maintenance to 3000*l.* The balance of the income under both settlements was accumulated. Following on notices on the trustees of the settlement of 1899, the respondents in the second appeal, to make returns of the income of the Earl from all sources for super-tax purposes for the years ending April 5, 1918, 1919 and 1920 respectively, these respondents made returns on the footing that there were to be included therein only the sums paid by the respective trustees of the two settlements for maintenance in the respective previous years. Assessments were made on these respondents on the basis that they were liable to be assessed in respect of the total income of the Earl for each such previous year, including in the two later years the income arising under both settlements, and in the case of all three years the income arising from the settled property, whether applied for maintenance or accumulated.

On an appeal against these assessments the respondents were content to be assessed to super-tax in respect of the amounts included in their returns, but contended that they were not liable to assessment in respect of any other amount.

The Commissioners decided in favour of the respondents.

Rowlatt J. affirmed the decision of the Commissioners, and his decision was affirmed by the Court of Appeal (Lord Hanworth M.R. and Scrutton L.J.; Sargant L.J. dissenting).

For the year ending April 5, 1921, an assessment to super-tax was made upon the Earl himself, being still an infant, in respect of his income of the previous year.

On appeal, the Special Commissioners discharged the assessment, but Rowlatt J. reversed the decision of the Commissioners and upheld the assessment, and no appeal was brought from his decision.

1928. Feb. 14, 16, 17. *Sir Douglas Hogg A.-G.* and *Stamp* (with them *Reginald Hills*) for the appellants. That s. 41 of the Income Tax Act, 1842, was regarded by the Legislature as applicable to assessments to super-tax may be inferred from the language of s. 72 of the Finance (1909–10) Act, 1910, by which super-tax was created. By sub-s. 6 of that section " all provisions of the Income Tax Acts relating to persons who are to be chargeable with duty " are to apply to the charge and assessment of super-tax " so far as they are applicable." By sub-s. 2 every person who is chargeable with income tax under s. 41 of the Act of 1842 as representing an incapacitated person, is required to make a return of the total income from all sources of such incapacitated person. It is unreasonable to read the words " persons who are to be chargeable with duty " in sub-s. 6 as excluding the persons who are expressly referred to as so chargeable in sub-s. 2. It being conceded that the income of the Earl of Longford is chargeable with super-tax, s. 41 of the Act of 1842, and r. 4 of the All Schedules Rules of the Act of 1918, by which s. 41 has been replaced, have been properly applied so as to render the Earl's guardian and trustees liable to be assessed in respect of such income on his behalf. The conception of a total income was present to the mind of the Legislature in the Act of 1842, and the only difference is that, whereas by the Act of 1842 that conception was applied to exemption, in the present case it is applied to additional charging. The authorities on super-tax have proceeded on the basis that s. 41 is applicable, but have decided, on the principle of *Tischler* v. *Apthorpe* (1) and *Werle & Co.* v. *Colquhoun* (2), that the method of assessment thereby provided is not the only remedy, but is merely auxiliary to the general powers of the revenue authorities: *Brooke* v. *Inland Revenue Commissioners* (3); *Inland Revenue Commissioners* v. *Huni* (4); *Whitney* v. *Inland Revenue Commissioners* (5); *Drummond* v. *Collins.* (6) Where the total income arises under different

(1) (1885) 2 Tax Cas. 89.
(2) (1888) 20 Q. B. D. 753.
(3) [1917] 1 K. B. 61, 69; [1918] 1 K. B. 257, 265, 268.
(4) [1923] 2 K. B. 563, 570.
(5) [1924] 2 K. B. 602, 610, 613; [1926] A. C. 37, 44, 53.
(6) [1915] A. C. 1011, 1019.

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trusts any set of trustees may be assessed in respect of the whole income, leaving the burden to be apportioned between the different sets of trustees. Assuming that trustees cannot be assessed to income tax on behalf of an infant in respect of income not included in their trust, they can be assessed in respect of the income under their control.

Latter K.C. (with him *Andrewes-Uthwatt*) for the respondents (called on in the second appeal only). The contention of the appellants involves the imposition of a liability on trustees in respect of super-tax far in excess of any liability imposed upon them in respect of income tax. This new and additional liability is not expressly imposed by the statute, and, in accordance with well settled principles, it cannot be implied. Sect. 41 of the Income Tax Act, 1842, is concerned only with assessments on income controlled by the person assessed and cannot be made to apply to an assessment to super-tax, which falls to be made by one assessment in respect of the total income to which a person is beneficially entitled. Assessments to income tax are made severally in respect of the particular profits arising from a separate source and without any deduction. The total income of an individual for the purposes of super-tax is arrived at not only by the aggregation of all the profits from every source, but by the deduction of all annual interest and other annual payments by which the income is diminished. The Acts contain no provision for the assessment of super-tax in respect of part of the total income or for the apportionment of super-tax among the agents or trustees of an incapacitated person.

[He referred to *Earl Howe* v. *Inland Revenue Commissioners* (1); *Brooks* v. *Inland Revenue Commissioners* (2); *Davis* v. *Inland Revenue Commissioners*. (3)]

Sub-s. 2 of s. 72 of the Finance (1909–10) Act, 1910, imposes a duty on the trustee or committee of an incapacitated person to make a return of the total income for super-tax purposes of the incapacitated person, but that does not

(1) [1919] 2 K. B. 336.
(2) [1914] 1 K. B. 579, 587.
(3) [1922] 2 K. B. 805, 815; [1923] 1 K. B. 370, 375.

necessarily imply that such trustee or committee is assessable to super-tax on his behalf.

Stamp replied.

The House took time for consideration.

1928. March 22. LORD BUCKMASTER. My Lords, I am of opinion that these appeals must fail, and I had prepared and reduced to writing the reasons that have led me to that conclusion, but since doing so I have had the advantage of reading the judgments of my noble and learned friends, Lord Sumner and Lord Warrington, with which I entirely agree, and there is no need that those judgments should be repeated. The question involved is no great principle of law; it is nothing but the construction of clumsy and ill-fitting clauses in Acts of Parliament. When, therefore, the result that has been reached is one on which there is common agreement, there is no need to expatiate upon the process of reasoning which has been used. I am therefore of opinion that these appeals should fail, and I shall move the House that they be dismissed.

VISCOUNT SUMNER. My Lords, the respondents have all been charged with super-tax under General Rule 4 of the Income Tax Act, 1918, or under the words of s. 41 of the Income Tax Act, 1842, which enacts "that the trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person . . . . shall be chargeable . . . . in like manner and to the same amount as would be charged if such infant were of full age" etc. If this provision of the Income Tax Acts is not applicable to super-tax within s. 7 of the Act of 1918 or s. 72, sub-s. 6, of Part IV. of the Finance (1909–10) Act, 1910, they cannot be charged and the appeals fail.

There are, however, two further respects, in which, as I think, some of the assessments were bad and were rightly

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discharged. (1.) The Countess of Longford, as guardian of the infant Earl, had not the control or management of his property at all. She simply laid out for his benefit such sums as his trustees thought fit to assign for his maintenance and placed in her hands, to be disbursed for them in that behalf, but the money remained vested in them in trust and was subject to their control or management. (2.) After an interest in the Bedfordshire estates vested in the Earl in 1918, he was beneficially entitled to the income of two trust properties, the Irish estates, in which his interest had taken effect in 1915, and the Bedfordshire estates, the trustees in each case being different persons, separately assessed. "The management of the property of the infant" means grammatically the management of all the property of the infant, in respect of which the trustees are charged, and these words are part of the description of the persons chargeable. Such really is the position with regard to income tax. As applied to super-tax, charged on a trustee of a part of the whole income to which the beneficiary is entitled, the matter is otherwise. If persons having the management of some of the property of the infant were intended to be included in this description, the definite article "the" must have been omitted. In connection with super-tax such an intention would have been entirely out of place. The imposition of personal liability for an additional duty of income tax, levied on the total income of the beneficiary, as ascertained by a complete enumeration of all sources subject only to certain authorized deductions, upon a trustee, who held a part only of the beneficiary's entire property and that part possibly only a small one or a part yielding no income, would be a travesty of rational taxation.

These considerations, however, do not apply to the trustees of the Irish estates before the Earl's interest in the Bedfordshire properties took effect and their case in the earliest years of these assessments must be specially considered. While s. 66 of the Finance Act of 1910 defines what super-tax is and imposes the charge, it is s. 72, which provides by a series of sub-sections for the mode of assessment and

the machinery of collection. Sub-ss. 1 to 5 inclusive deal only with assessment. It is not till sub-s. 6 is reached that provision is made for charge, collection and recovery of duty and this is accentuated by the fact that sub-s. 2 authorizes the requirement of returns from persons (including those, who represent incapacitated, non-resident or deceased persons) whether or not they are chargeable with super-tax, so that in some of such cases that provision is only for the purpose of obtaining information.

Sub-s. 6 is framed as an omnibus incorporation of pre-existing provisions upon an indefinitely selective plan. "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty . . . . shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section."

In deliberately adopting this terse and compressed form of enactment the Legislature was, no doubt, fully alive to the fact, that its merits and convenience are attended by some disadvantages. The risk of this had, however, to be run. By using the words "so far as they are applicable," Parliament handed over to others what it might have prescribed itself and those others were persons, who were not legislators but judges. The income tax provisions were not made applicable, so that they could be enforced, but were to be enforced only so far as they were applicable. Nothing corresponding to mutatis mutandis or any other labour-saving but indefinite phrase is to be found here. The distinction is material. An administrator might hold a provision to be applicable, which avoids a loss of revenue, even though the taxpayer loses the benefit of the form of the statute, but judges have to determine the applicability of a regulation by asking how far it is consistent with justice to the subject and with proper construction of the enactment. Accordingly we must not feel constrained to pronounce this section applicable, merely because the contrary construction may involve the use of cumbrous and defective machinery

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for collecting the tax or even may lead to the escape of some, who have quite money enough to pay with.

My Lords, viewed in this way I do not think s. 41 is "applicable" to super-tax. The application would, I think, make the section read much to the following effect. "The trustee of any infant, whether resident here or abroad, who has the control or management of the chargeable property of that infant, shall himself be chargeable, as the infant would be charged if of age, both as to the extent of his chargeability and as to the manner of enforcing it." Let us see what the effect would be and whether it does or does not pass the bounds of application.

In the case of income tax the extent of the liability, depending as it does on the various schedules and cases under which the particular part of the property is being assessed, is limited to the income of the property, which is under the trustee's control and is assessable within the particular assessment area. If the trustee returns that and pays on it, he is no further chargeable, although the infant may be beneficially interested in other taxable property, over which that trustee has no control at all. The manner in which he is made liable is by the method of local and separate assessments provided for income tax. Exemptions and deductions are the subject of a separate manner of reclaiming tax already paid, with which the trustee is not, as such, in any way concerned.

In the case of super-tax it is far otherwise. The person, who is chargeable, whether in a representative capacity for another person or on his own account, has to return the whole of the income, which is subject to super-tax, and he has to make the deductions, which the Act allows, if there are any, before his return, on which the tax is to be computed, is complete and ready for enforcement of the tax. In the case of a return by a person representing some one else, the super-tax, duly computed, is wholly and as a whole chargeable on him. For super-tax purposes there is no provision for making piecemeal assessments or for levying the tax in part on one person and in part on another. The person, who is

made liable to charge at all, has to bear the entire burden of it.

My Lords, I think this comparison at once shows that, in the case of super-tax, charging a trustee "in like manner" as the beneficiary would be charged, if of age, is a totally different scheme of charge from that enacted for income tax. The case is not one of selecting such parts of the income tax scheme as are applicable to the scheme of the super-tax, and making use of them, but of introducing provisions, which are applicable to super-tax and correspond to the income tax provisions but are not already enacted anywhere. That is not a problem for courts of justice. It involves substituting the words "with suitable modifications" for the words "so far as applicable," and that is not for us to do.

Further, it could be done only to the grave and unjust prejudice of the trustee to be charged. Whatever he may happen to know or be able to ascertain in a particular case, he is not as trustee seised of any information outside the limits of his trust. He does not know that there may not be other trustees of other trust property, or that the infant is not making something here or abroad. Instances of such precocious industry are not uncommon and are sometimes on a considerable scale. The Act has to be read as applicable to all cases falling generally within its words, whether or not in particular, and perhaps numerous, cases the trustee is so circumstanced as to meet with no such difficulties. He cannot know qua trustee whether he is chargeable or not, or whether he should contest his liability or not, for, so far as he is aware, he may be in control of all the chargeable property of the infant, and thus, having made the return, he may have to pay on an excessive amount, because in his ignorance he did not make deductions, which ought to have been made, before arriving at the net sum chargeable to super-tax. If he refuses to make the return, on the ground that there may be other chargeable property of the infant over which he has no control, he does so at his peril. If he pays, he may be unable to indemnify himself, or may be

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only able to enforce his rights at the cost of litigation, which at best will leave him with costs to bear himself.

For these reasons, my Lords, I think these assessments were rightly dealt with by the Commissioners and the appeals fail. It is not necessary to point out how the infant or other incapacitated person is to be made amenable, though s. 72, sub-s. 2, furnishes the Inland Revenue with means of obtaining extensive information, more than many trustees could get. All I can say is that I agree with the Court of Appeal in thinking, that the argument for the Revenue makes a greater call on the words " so far as applicable " than those words can bear.

I think that it is irrelevant to refer to the cases, in which it has been said that sections merely providing a machinery for collection of a charge, which is imposed in general terms elsewhere, cannot restrict the attachment of the charge, being " in aid and not in derogation of it " (*Tischler* v. *Apthorpe* (1) and *Werle & Co.* v. *Colquhoun* (2)), because here the express words, " so far as they are applicable," of themselves limit the application of the collection sections for all purposes, and direct an inquiry and a discrimination between those which apply and those which do not. The latter cannot aid the charge of super-tax, since they do not apply to it.

My Lords, I am desired to add that in the opinion I have just read to your Lordships my noble and learned friends Lord Wrenbury and Lord Carson concur.

LORD WARRINGTON OF CLYFFE (read by LORD BUCKMASTER). My Lords, these are two appeals raising the question whether an infant can be assessed to super-tax, in the one case in the name of his guardian and in the other in the name of trustees who have the control and management of certain property to the income of which he is entitled.

The infant (the sixth Earl of Longford) was born on December 29, 1902, and attained the age of twenty-one years on December 29, 1923. The respondent the Countess of Longford became on the death on August 21, 1915, of the

(1) 2 Tax Cas. 89. (2) 20 Q. B. D. 753.

fifth Earl the guardian of his son the infant. The infant on his father's death became entitled as tenant in tail male to certain lands and hereditaments in Ireland and to certain personalty which represented the proceeds of sale of realty under a settlement dated August 29, 1899, of which the respondents in the second appeal are the trustees. The trustees were by the settlement appointed trustees for the purposes of s. 42 of the Conveyancing and Law of Property Act, 1881.

Upon the death on January 12, 1918, of his grandmother Selina Dowager Countess of Longford, the infant became entitled as tenant in tail male to certain estates in Bedfordshire under a settlement dated November 8, 1862, the trustees whereof are not the same persons as the trustees of the settlement of 1899.

Apparently—though the fact is not expressly stated in either of the two cases hereafter mentioned—the infant was not, until January 22, 1918, entitled to the income of any property other than that comprised in the settlement of 1899.

After the death of the fifth Earl, the trustees of the last mentioned settlement paid yearly during the minority of the infant the sum of 2500*l.* for his maintenance, the residue of the income under that settlement being accumulated.

For the year ending April 5, 1917, the Special Commissioners of Income Tax made an assessment upon the respondent the Countess as guardian of the infant in a sum of 12,000*l.* being the estimated amount of the total income of the Earl under the settlement of 1899.

On appeal this assessment was discharged, it appearing that the only income passing through the hands of the guardian was the above mentioned allowance for maintenance, and that this was below the super-tax limit.

A case stated by the Special Commissioners for the opinion of the High Court was heard by Rowlatt J. on December 20, 1916. The learned judge dismissed the appeal of the present appellants and confirmed the discharge of the assessment. His judgment was on July 27, 1927, affirmed by the Court

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of Appeal (Lord Hanworth M.R. and Scrutton and Sargant L.JJ.).

As regards the appeal in the case of the Countess, it is enough to say, that I agree with the judgments in the Court of Appeal and particularly with that of Sargant L.J., and that this appeal should be dismissed with costs.

I now turn to the other appeal—that against the trustees of the settlement of 1899.

The years in question in this case are the years of charge ending respectively April 5, 1918, April 5, 1919, and April 5, 1920. It will be observed that the first of these years was that in which, namely, on January 12, 1918, the infant became entitled to the property comprised in the settlement of 1862, but none of the income of this property accrued to him during the year preceding the year of charge.

Assessments having been made upon the trustees of the settlement of 1899 in respect of the total income of the infant for each of the said three years of charge, the trustees appealed to the Special Commissioners, who, being of opinion that the trustees were not liable to be assessed to super-tax, reduced the assessments to certain agreed sums in each of the three years.

A case was stated for the opinion of the High Court and was heard by Rowlatt J., who on December 20, 1926, made an order confirming that of the Commissioners and dismissed the appeal. An appeal to the Court of Appeal was on July 17, 1927, dismissed by a majority (Lord Hanworth M.R. and Scrutton L.J., Sargant L.J. dissenting).

In subsequent years of charge the infant himself, while still a minor, was assessed to super-tax, and there was no appeal as to their assessment.

The question turns on the true construction and effect of the provisions as to super-tax contained in Part IV. of the Finance (1909–10) Act, 1910. It is true that in the last year the Act in force was the Income Tax Act, 1918, but the provisions of this Act are practically identical with those previously in force and it will be convenient to pursue the course adopted in the argument and deal with the old Acts

alone. It is however necessary to bear in mind that the original limit for super-tax has been lowered in amount and the tax itself is charged according to a graduated scale.

By s. 66, sub-s. 1, of the Act of 1910 there is to be charged in respect of the income of any individual, the total of which exceeds a fixed sum an additional duty of income tax (in the Act referred to as a super-tax) at the rate of 6*d.* for every pound of the amount by which the total income exceeds so much.

By sub-s. 2: "For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; but"—and then there follow directions as to particular deductions applicable only to super-tax. Sect. 72, sub-s. 2, omitting immaterial words is as follows: "Every person upon whom notice is served . . . . requiring him to make a return of his total income from all sources or, in the case of a notice served upon any person who is chargeable with or liable to be assessed to income tax under section forty-one of the Income Tax Act, 1842, ... as representing an incapacitated, non-resident, or deceased person, of the total income from all sources of the incapacitated, non-resident, or deceased person, shall, whether he is or is not chargeable with the super-tax, make such a return in the form and within the time required by the notice."

In sub-s. 5 provision is made for an assessment by the Commissioners if no return or an unsatisfactory one is made; sub-s. 6, again omitting what is immaterial for the present purpose, is as follows: "All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and &c. . . . . shall, so far as they are applicable, apply to the charge, assessment, &c., of duty under this section" . . . .

Before proceeding to consider the provisions of the Income Tax Acts referred to in sub-s. 6 it is well to call attention

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to certain fundamental differences between income tax and super-tax. Income tax is chargeable under certain categories as to some of which no assessment on the taxpayer is made, e.g., the case of income from securities the tax on which is deducted at the source. No assessment of total income is made, nor is any return of such income required except where a claim is made for exemption or abatement. For this purpose certain payments out of income may be deducted before the total is ascertained.

In the case of super-tax the assessment itself is in respect of the total income from all sources, a form of assessment for which there is no provision in the Income Tax Acts.

Sect. 41 of the Income Tax Act, 1842, reading it shortly and omitting what is immaterial is as follows: "The trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person . . . . shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself." Provision is made for the charging of a non-resident person in the name of such trustee, etc., as above or of any factor, agent, or receiver, having the receipt of any profits or gains arising as mentioned in the Act and belonging to any such person "and every such trustee &c. shall be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same."

Provision is made (s. 44) for the indemnity of the persons described in s. 41 in respect of any duty they may pay.

The provisions relating to claims for exemption and abatement and statements of total income from all sources for that purpose are contained in s. 164. It is unnecessary to state them.

As to s. 41 it is to be observed that the chargeability of the trustee depends upon his having the control or management of "the property" of the incapacitated person. "The property" there seems to me to be not the entire property of the incapacitated person, but that property as to which the trustee, etc., has the control and management.

The application of the section is further limited to that part of the property as to which the incapacitated person would be chargeable if not under incapacity. It would not for example include property the income of which was taxed at the source. In short the section does not make the trustee chargeable in respect of the total income of the incapacitated person or even in respect of the income of the whole property under his control or management but only in respect of that income as to which the incapacitated person would be directly chargeable.

Under the provisions relating to super-tax the position is fundamentally different. This tax is charged on the total income from all sources of the subject, and that income is a technical term; it is not merely the sum total of the several amounts of income charged with income tax under the different categories specified in the Income Tax Act, but it is that income after certain deductions and adjustments which are not permissible under that Act.

Is then the provision in s. 41 of the Act of 1842 as to the chargeability of a trustee "applicable" to super-tax so as, under s. 72, sub-s. 6, of the Act of 1910, to render him chargeable to the latter tax? I agree with Rowlatt J. and the majority of the Court of Appeal that in the absence of special directions to that effect it is impossible to apply the provisions in question to circumstances so different from those in respect of which they were enacted.

Taking the facts of the present case, the effect of the application of the provisions of s. 41 in the last two of the years in question would be to render the trustees chargeable not only in respect of the income they themselves receive but in respect also of that received by the trustees of the settlement of 1862, and they have in fact been so charged

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in the assessments now in question. It may be that as between themselves and the latter trustees the burden might be apportioned, but there are no provisions in the statutes for any such arrangement.

As regards the first year it is true that the only income included in the assessment was that received by the trustees of the settlement in 1899, but even so there is the same difficulty that the "total income" is not the same as the income in respect of which the trustees would be chargeable under s. 41, and I cannot think that the mere accident, that there is not included in the total income any item of receipt not derived from the trusts of the settlement can make such a difference as to bring into application a provision which, if there were even the most trifling additional item of receipts, would be inapplicable.

Great reliance was placed by the appellants on the provisions of s. 72, sub-s. 2, of the Act of 1910 as to returns. I do not think this sub-section affects the question; it contains it is true a substantive provision that a person chargeable to income tax under s. 41 as representing an incapacitated person may be required to make a return of the total income from all sources of the incapacitated person. But it does not follow that, because the statute requires in express terms information from such representative person, he is therefore to be chargeable, by words of reference such as are contained in sub-s. 6, to an extent to which he could not be charged under s. 41 and in respect of a tax so different in its nature as super-tax is from the tax mentioned in that section.

On the whole, for the reasons I have given, which are I think substantially those given by the majority in the Court of Appeal and by Rowlatt J., I think this appeal fails and ought to be dismissed with costs.

In each case:—

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, March 22, 1928.

Solicitor for the appellants: *Solicitor of Inland Revenue.*
Solicitors for the respondents: *Walfords.*

[HOUSE OF LORDS.]

OTTOMAN BANK . . . . . APPELLANTS ; H. L. (E.)*

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JEBARA . . . . . RESPONDENT. *May* 1.

Sale of Goods—Effect of War on executory Contract—Delivery of Goods to Syrian Customers after Outbreak of War with Turkey—Conversion—Payment whether in Sterling or Turkish Currency—Depreciated Currency—Treaty of Peace (Turkey) Order, 1924—*Treaty of Lausanne, art.* 84.

The respondent, a British subject residing in Manchester, was in the habit of consigning Manchester goods to customers in Beyrout. The course of business was for him to draw a bill at sight on the customers for the amount in sterling, representing the cost of the goods and commission, and to hand it, with the bills of lading and invoices, to the Manchester branch of the appellants, a bank incorporated in Turkey. The Manchester branch then made an advance to him on the bill, and sent the documents to their Beyrout branch, who collected the price from the customer in exchange for the goods. On the Manchester branch being advised by the Beyrout branch that the price had been paid, a cheque for the sterling value of the goods, less any advance made, was handed to the respondent. In accordance with this practice the respondent consigned to Beyrout goods which arrived there shortly before the outbreak of war, on November 5, 1914, between this country and Turkey, on which date the appellants held the bills and the documents representing the goods. The bills were in the following form: "Please pay to our order value cheque on London the sum of £ sterling. Shipping documents attached to be given up on payment." After the outbreak of war the Beyrout branch of the appellants delivered the goods to the customers, taking payment in piastres of a sum fixed by the Beyrout branch as the price of sterling in London, and on the conclusion of the war, the piastres having fallen in value, the appellants claimed that they were only liable to pay the respondent an amount in sterling which at the then current rate of exchange represented the value of the piastres they had received for the goods.

The respondents sued the appellants to recover the sterling amount of the bills, or, alternatively, damages for the conversion of the goods :—

Held (1.), that the words "value cheque on London" meant that the payment, which would ordinarily be in Turkish currency, must be so calculated on the exchange of the day as to represent the price of a cheque on London for the amount of the bill; (2.) that the appellants, by parting with the goods at Beyrout in exchange for payment in lawful

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* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

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currency of the bills in full, constituted themselves debtors to the respondent for the sterling amount of the bills and, a remittance of the money to this country being impossible during the war, were liable on the conclusion of the war to pay in sterling; (3.) that, the bank at Beyrout and the Syrian merchant both being Turkish subjects, the outbreak of war did not prevent the delivery of the goods to the customers, and that the claim for conversion failed.

By art. 84 of the Treaty of Lausanne, "where payments to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected in the currency in which they were collected."

Held, that the article did not apply, as the bank at Beyrout were not agents of the respondent to collect piastres, but by their own act became debtors in sterling.

Decision of the Court of Appeal [1927] 2 K. B. 254 reversed and decision of Rowlatt J. restored.

APPEAL from a decision of the Court of Appeal (1) varying a judgment of Rowlatt J.

The action was brought by the respondent against the appellants for payment of a sum of 3161*l.* 6*s.* 6*d.*, representing the sterling value of the bills of exchange collected by the appellants in the circumstances narrated in the headnote. In the alternative the respondent alleged that, if the war with Turkey rendered the agreement between the appellants and the respondent impossible of performance, the appellants had wrongly parted with the respondent's goods and claimed damages for wrongful conversion.

The facts are fully stated in the report of the case before the Court of Appeal, and sufficiently appear from the judgment of Viscount Dunedin.

Rowlatt J. gave judgment for the respondent for the sum claimed under the first head of claim.

The Court of Appeal (Bankes, Scrutton and Atkin L.JJ.), varying the judgment of Rowlatt J., held that the appellants in delivering the goods to the consignees at Beyrout acted without authority and were liable in damages for conversion.

After judgment had been delivered by the Court of Appeal the respondent intimated to the appellants that he was content to accept the judgment of Rowlatt J.

(1) [1927] 2 K. B. 254.

1927. Dec. 1, 2, 6, 8. *Hon. Geoffrey Lawrence K.C.* and *Somervell* (with them *I. W. G. Barry*) for the appellants. This case is completely covered by art. 84 of the Treaty of Lausanne. What was done by the appellants through their branch in Beyrout is exactly what is provided by the article. Under a pre-war contract they collected during the war sums in Turkish currency which represented payments to be made to the enemy in sterling, and after the war such payments could be made by handing over the sums actually collected in the currency in which they were collected. The appellants got the equivalent of sterling in piastres, and after the war, when it first became possible to transmit the money, their only duty was to hand over those piastres or their equivalent in sterling at the rate of the day when they were handed over. The words in the bills of exchange, "value cheque on London," contemplated a payment in Turkish currency of a sum which was the equivalent of a cheque on London, and this was in accordance with the ordinary course of business between the parties. Assuming that art. 84 does not apply, the Beyrout branch were bound to deliver the goods to the drawees against payment in piastres. The appellants are a Turkish corporation, and had the goods in question in a branch in Turkish territory, and, on being required by the consignees, who were Turkish subjects resident in Turkish territory, to deliver the goods consigned to them, they could not set up the outbreak of war as a reason for refusing to comply. They would have had no defence to an action by the consignees for the goods.

The claim for conversion fails, first, because the respondent had not such a property in the goods as would support an action for conversion, and, secondly, because there was no conversion in fact. The position of the respondent was that of an ordinary commercial agent, and the property in the goods passed to the consignee on shipment. The only obligation of the bank in Beyrout was to act reasonably, having regard to all the circumstances. In handing over the goods to the consignees on receiving the price, they acted in the way in which it might be presumed the respondent wished them to act. The war did not wipe away

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the contractual obligation to deal with these goods in Turkey according to the mandate, because that did not involve any intercourse with the enemy and was not opposed to any public policy. But, assuming the contrary, the property in these goods had passed to the consignees, therefore the respondent had no right to sue for conversion. Whether the right of the consignees is regarded as founded on contract or on property it was impossible for the bank to withhold the goods from them. That is a complete answer to the judgment of the Court of Appeal. Rowlatt J.'s judgment is equally open to objection, because he disregarded the war. If it be said that the obligation of payment, as between the appellants and the respondent, could only be performed by producing a cheque on London, to that extent this was an executory contract which for its further performance required intercourse with the enemy, and it was therefore abrogated and put an end to by the war.

[They referred to *Ireland* v. *Livingston* (1); Bullen and Leake, 3rd ed., p. 291; *Milgate* v. *Kebble* (2); Sale of Goods Act, 1893, ss. 19, 39, 41; *Ertel Bieber & Co.* v. *Rio Tinto Co.* (3)]

Cyril Atkinson K.C. and *Sir H. Cassie Holden* for the respondent. Either the outbreak of the war put an end to the contracts for the delivery of the goods to the drawees of the bills, in which case the appellants in delivering the goods acted without authority; or it did not, in which case the goods could only be delivered to the customers on terms which would secure sterling for the respondent. The customers paid for sterling, and the appellants as trustees are accountable to the respondent for sterling: *Insurance Co.* v. *Davis* (4); *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie.* (5) The Beyrout branch received piastres in such a way that they treated themselves as having received sterling on the respondents' account. It was a sterling transaction throughout. It is said that the customers

(1) (1872) L. R. 5 H. L. 395, 408, 409.
(2) (1841) 3 Man. & G. 100.
(3) [1918] A. C. 260, 267, 269.
(4) (1877) 95 U. S. 425, 430.
(5) [1918] A. C. 239, 244, 245, 248.

were the consignees, but the bills of lading were indorsed, not to the customers, but to the appellants. The property in the goods remained in the respondent, but the appellants had a special property therein to the extent of their charge: Benjamin on Sale, 6th ed., p. 420; Sale of Goods Act, 1893, s. 19, sub-s. 2. The customer's right to get the goods on payment was a purely contractual right and, this being an executory contract of purchase and sale, the war put an end to it. Art. 84 of the Treaty of Lausanne, as was held by both the Courts below, does not apply, for the bank at Beyrout were not agents to collect piastres but sterling. The respondent is content with the judgment of Rowlatt J., that he is entitled to payment in sterling, but, failing that, he relies on the judgment of the Court of Appeal that the appellants were liable in damages for conversion.

Hon. Geoffrey Lawrence K.C. replied.

The House took time for consideration.

1928. May 1. VISCOUNT DUNEDIN. My Lords, this is an action brought at the instance of a Manchester merchant against the Ottoman Bank for the proceeds of certain bills of exchange collected by the bank. The course of dealing out of which the question arose was as follows: The respondent, who is a domiciled Englishman residing in Manchester, was in use to buy Manchester goods for despatch to correspondents in Syria. He drew bills on these correspondents and handed the bills to the appellants' bank in Manchester along with the bills of lading of the goods which had been shipped. Upon this the bank made an advance of 80 per cent. on the amount of the bill. The bills and the bills of lading were then sent to Beyrout. On the arrival of the goods at Beyrout the Syrian correspondent on whom the bill was drawn paid the bill and received the bill of lading or, if the goods had already been removed from the ship, then the goods themselves, and the Manchester bank then, on advice of the Beyrout Bank, credited the respondent with the amount of the bill. War was declared between England and Turkey on November 5, 1914. At that date

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several consignments of goods had arrived, but the documents of title and the bills were still in the hands of the bank at Beyrout. The persons for whom the goods were destined came forward and paid the bills and got the goods. The payments were actually made in Turkish currency, but the calculation of the amount of that currency needful for the sum expressed on the face of the bills was made on the rate of exchange with London. A remittance from Beyrout to London direct was impossible, and no sum has as yet been credited to the respondent in respect of the bills. The respondent raised action for the amount on the face of the bills. The appellants refused to pay, but offered the amount represented by the number of Turkish piastres actually received calculated on the exchange of to-day. The action depended before Rowlatt J., who gave judgment for the respondent. He held that in the circumstances above mentioned the appellants had in law been paid in sterling and must repay in sterling. On appeal the Court of Appeal recalled that judgment. They held that the true view of the case was that the effect of the war was to preclude the appellants at the Beyrout branch dealing with the goods at all; that in handing the goods to the Syrian merchant they acted without authority and not as agents of necessity; that consequently they were liable as for conversion, and they directed an inquiry as to what the damages of that conversion would be. Appeal from that judgment has been taken to your Lordships' House.

All the bills were in the same form, so one may be taken as a specimen. It is in this form. It is dated Manchester. "Please pay to our order value cheque on London the sum of one hundred and sixty three pounds eleven shillings sterling. Value received. Shipping documents attached to be given up upon payment." It is addressed to Messrs. Gandour Frères, Beyrout. It is signed Jebara, and is indorsed "Pay to the order of the Imperial Ottoman Bank."

The first question to be considered is what is the proper meaning of this document? The bill is expressed for a sum in English currency, or in other words, in sterling, and the

ordinary result is that only payment in sterling will be a proper payment in respect of the bill. But the appellants argue that the words " value cheque on London " alter what would otherwise be the effect of the bill. They say that these words mean that the only proper payment of the bill could be made by tendering a cheque on London ; that this was admittedly not done and that consequently their only liability arose not from the terms of the bill but from the fact that they had got Turkish piastres for the goods. These Turkish piastres they say they are willing to return just as if they had put them in a box and kept them there. As a matter of fact they did not keep them in a box, they traded with them ; but in the view which I take of the bill I need not explore this subject further.

My Lords, I do not agree with this view of what the words " value cheque on London " meant. I think they meant no more than this, that it must be quite understood that the payment which obviously would not be made in Beyrout in actual English currency must be so calculated as to represent what a cheque on London for the amount on the bill would cost. That the words are pleonastic may be admitted, but what an absurd result is reached by the interpretation the other way ! The Syrian merchant comes forward to take up the bill and get the goods. The bank itself would sell a cheque on London, the price of such a cheque for the sum in the bill would be calculated on the exchange of the day, and just because the merchant pays in piastres the same sum instead of asking for a cheque and then handing back the cheque as soon as received, it is to be held that he has not properly taken up the bill. My view is this, that as the bank in Beyrout accepted the payment in lawful money from the Syrian merchant and handed over the goods it constituted itself, as in a question with the drawer, debtor for the sterling amount on the face of the bill.

This is really the view of Rowlatt J. though expressed in somewhat different words.

My Lords, I am not able to take the view which commended itself to the Court of Appeal. Their judgment is rested on

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this, that the bank in Beyrout had no right to deal with the goods, the right to deal with them depending on the mandate which the respondent had given the bank in Manchester to collect the proceeds of the bill, and that mandate having been as a contract abrogated by the war. But it is not every contract that is abrogated by the war; it is only a contract which is still executory and which for its execution requires intercourse between the English subject and the enemy. Now this contract had been partially carried out, the bills had been indorsed, and the bank had been handed them and the indorsed bills of lading. From that a subsidiary contract arose, i.e., the contract that on payment of the bills the shipping documents should be handed over. Now to execute that no intercourse between an English subject and the enemy was necessary. The bank was a Turkish subject and the Syrian merchant was a Turkish subject. The bank therefore was in my view perfectly entitled to do what it did; nay more, it might have been forced to do it by the Syrian merchant on producing proof that he was the real consignee of the goods and proffering payment of the bill. That, in my view, shuts out any idea of conversion.

It is true that the part of the original contract which provided for a remittance of the proceeds could not be carried out. But that fact did not abrogate what had been already done, i.e., the indorsations and what followed thereon. The liability of the bank in my view rests not on the original mandate but on the fact that being entrusted with the goods they parted with them on payment of the bill, and thus we come back again to the original question of what acceptance of the payment really meant, which is what I have already dealt with. They constituted themselves debtors in sterling, and therefore in sterling they must pay.

Another point was raised by the appellants which did not commend itself to either Court, but which, as it was strenuously argued before your Lordships, must be mentioned. Art. 84 of the Treaty of Lausanne between Great Britain and Turkey, which by the Order in Council of August 12, 1924, has the force of law, is as follows :—

"The High Contracting Parties are in agreement in recognising that debts which were payable before the war or which became payable during the war under contracts entered into before the war, and which remained unpaid owing to the war, must be settled and paid, in accordance with the provisions of the contracts, in the currency agreed upon, at the rate current in its country of origin.

"Without prejudice to the provisions of the Annex to section II. of this part, it is agreed that where payments to be made under a pre-war contract are represented by sums collected during the war in whole or in part in a currency other than that mentioned in the said contract, such payments can be made by handing over the sums actually collected, in the currency in which they were collected. This provision shall not affect settlements inconsistent with the foregoing provisions arrived at by voluntary agreement between the parties before the coming into force of the present treaty."

I am of opinion for the reasons already stated that the sum now due was not collected in piastres. The bank at Beyrout were not agents of the respondent to collect piastres, but for the reasons already given became debtor by their own act in a sterling sum. Here again I take the same view as Rowlatt J.

On the whole matter I am of opinion that the judgment of the Court of Appeal should be recalled and the judgment of Rowlatt J. be restored, the respondent to have his costs before this House and in the Courts below. I move accordingly.

LORD SHAW OF DUNFERMLINE. My Lords, I am so thoroughly satisfied with the judgment pronounced by Rowlatt J. that I should have been well content humbly to adopt it as my own on the appeal in this case.

But the able and sustained arguments on both sides and the judgment in the Court of Appeal make it suitable that I should state in a few words how the case strikes me.

The transaction, to begin with, was entirely English; it was between the respondent, as an Englishman, and a branch

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of the appellants' bank in Manchester. The bill in question is a sample of several of the same character, which were granted in the course of similar business.

The respondent bought Manchester goods for Beyrout, where he had correspondents to whom he despatched those goods. He drew a bill of exchange upon them in the terms to be noted and handed to the bank this bill for collection in Beyrout. He also handed to the bank the bills of lading for the goods which had been shipped. The situation accordingly was plain to the effect that upon the bill being paid the corresponding bills of lading for the goods would be handed over by the bank as the counterpart. The transaction was unquestionably an English transaction for payment in England in English sterling money and delivery of the bills of lading for goods shipped in England.

War broke out between Turkey and England on November 5, 1914. Subsequent to the war, however, the business was continued by the appellants' bank at its branch at Beyrout. The goods had gone to Beyrout; the bills of lading had gone to the Ottoman Bank at Beyrout; the person to make payment under the bill was the Beyrout merchant. In short, the scene of the completion of the transaction is in Turkey. The duties to be performed were that, upon payment of what in the bill of exchange is called "value cheque on London," he was entitled to the delivery to him of the bills of lading and, of course, of the goods. The transaction was interpreted in this sense in Beyrout. The merchant presented himself at the bank, paid the equivalent of the sterling price in the official number of piastres, which had been regularly fixed and was known to the commercial public. This amount was accepted in piastres, and the bank thereupon proceeded not only to enter the sterling amount in its own books, but to fill up a document called a "bordereau," under which they purported to hold to the credit of their Manchester branch a sum of sterling equal to the amount of the bill of exchange. This bordereau was on February 4, 1919, actually sent from Beyrout to the Manchester branch of the appellants' bank. They were, accordingly, in this position, as advised

from Beyrout by the bank, that the respondent was entitled to be credited in England with that sum of sterling money.

The position of the bank, however, now is that the respondent is only to be credited with the value of piastres at the greatly fallen price at which they subsequently stood; and the simple question in the case is, was the transaction in Beyrout a transaction on which "value cheque on London" had been paid, that is to say, the equivalent of sterling money? In my opinion the case is substantially concluded upon facts by the evidence of Mr. Naville, formerly in the employment of the defendant bank and manager of the branch at Beyrout up to July 15, 1915. This is the record:—

"(Q.) Have you any doubt whatever that the bank acted in the same way precisely as they always acted?—(A.) To the best of my knowledge, I should think they did.

(Q.) When they come to estimate—say that they have got a bill sterling—how do they estimate how much money they are going to make this man pay?—(A.) The man would have the moneys that he brings to the counters at the rate at which you can get a cheque in London, or Paris.

Mr. Justice Rowlatt: Therefore, they did not ask for more, and they would not take less because he had got to pay for it at the rate?—(A.) The sterling rate of London.

Mr. Cyril Atkinson: And you understand that, as the result of what he is paying you, you are going to credit Manchester with so much sterling?—(A.) Yes.

(Q.) And you fix the price which you want to enable you to do that?—(A.) The Ottoman Bank in Beyrout fixes on Monday morning an official price, which is distributed and is absolutely official, and the bank provide for any normal amount, and any balance that is wanted they buy in the market," and it is clinched and wound up by Rowlatt J. as follows:—

"Mr. Justice Rowlatt: The long and short of it is that the drawee paid in sterling but you could not remit it?—(A.) That is so; that is the whole thing in a nutshell."

It is perfectly true that, after the outbreak of war, the Beyrout branch of the Ottoman Bank could not make any

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remittances of money to any English national—a term which would include its agent in Manchester. But it is to be observed that there was no bar whatsoever to the acceptance in sterling or in the full market equivalent of the day of a cheque upon London from another Turkish subject—namely, the customer in Beyrout. Both bank and customer were Turkish subjects there; and the legitimacy of the payment to the bank in Beyrout is, therefore, beyond question, there being no international quality about that part of the transaction.

In Turkey the bill of exchange was retired in full by a payment which, although in piastres, was acknowledged by the bank not only to the customer but to their own English branch to have been full payment for the goods. In my view, it is a mere juggle on the part of the appellants to suggest that these goods were got on a payment which meant something less or something different in result from full payment in English sterling. The piastres that passed were passed into the hands of the bank themselves at the bank's official valuation of the equivalent of sterling. When piastres have now fallen in value it does not seem to me to be open to them to plead that the transaction, so far as regards the English merchant, was not fully completed by delivery of the goods by them on the one hand and full payment of the bill by the merchant on the other.

There are other elements in the case which would confirm this view, as I hold it to be established that not only were the amounts of Turkish currency in all cases fixed by the appellants themselves as the price of providing the sterling credit, but that it was open to the bank to have converted the Turkish currency into Swiss or United States currency. That they did not do so was simply because, as I hold, they thought themselves then fully paid at the Turkish piastres rate of the day. In my view they were right in so thinking; and they have been paid in "value cheque on London."

Prohibitions against doing business with English or other enemy nationals cannot apply to a case of a payment made between two Turkish nationals and goods delivered on the

head of a payment, documents and goods passing from one Turkish national in Beyrout to another. The appellants' Manchester branch was given credit for the sum of sterling money which they have been advised by the bank itself is the proper sum to credit on this particular account.

In this view all questions of conversion or as to agency by necessity drop out of the case. There remains, however, art. 84 of the Treaty of Lausanne between Great Britain and Turkey of date August 12, 1924. The appellants desire to utilize the words of that article as justifying them in payment of the currency agreed upon at the rate of the currency in its country of origin. I do not think the currency agreed upon in this transaction was piastres and, therefore, in my view the reference to the treaty fails, but upon this subject I desire to agree expressly with the language of my noble and learned friend, Lord Dunedin.

In the Court of Appeal the case was decided on the footing of wrongful conversion, and the result would probably be that the sum to be awarded after inquiry on that ground—the value of the goods having greatly increased—would be in amount more onerous to the bank, but as your Lordships hold that this was made and concluded and credited as a sterling transaction such inquiries are out of place.

It should be added that the House was informed at the bar that on the judgment of the Court of Appeal being delivered intimation was made by letter to the appellants that all the respondent wanted was to be credited and paid in sterling, as per the judgment of Rowlatt J. This offer was declined and the appeal was brought to this House. In these circumstances the respondent should have his costs of the entire cause, including this appeal.

I think the judgment of Rowlatt J. fully and correctly covered the case and that his judgment should be restored.

LORD PHILLIMORE. My Lords, the plaintiff in this case is an Armenian carrying on business in Manchester. The defendant bank carries on business in Great Britain, Turkey, Syria and elsewhere, having one of its head offices in London

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and branch offices among others at Manchester and at Beyrout in Syria.

The plaintiff before the war was in the habit of buying Manchester goods and transmitting them to correspondents in Syria. Business was conducted in the following manner: the plaintiff took a bill of lading making the goods deliverable to the bank; he also drew a bill upon his particular correspondent for whom the goods were destined and indorsed it to the bank; took the bill of lading and the bill of exchange and other shipping documents to the Manchester branch of the bank and obtained an advance of 80 per cent. on the value of the bill.

When the goods reached Beyrout, if the Syrian correspondent had come forward in time and paid the bank, he took delivery. If not, the bank took delivery ex ship, and the correspondent when he came along took delivery from the bank.

The form of the bill of exchange required payment to be made of the value as if payment were made in London. The words ran: "Please pay to our order value cheque on London the sum of £ ."

The practice of the bank—a perfectly reasonable one in time of peace—was to take payment in Turkish piastres (the current coin of Syria), and then to credit in account the head office in London with the sum in sterling. The head office then paid to the plaintiff the balance due to him.

When the war broke out several consignments were in transit, or at any rate had not been delivered to the correspondents. As each came along however, the bank handed the goods to him on receiving that sum in piastres, which at the moment was equivalent to sterling in London.

There being war between the two countries, Turkish law did not permit money to be remitted to Great Britain, but for the purpose of ascertaining a correspondency between the sterling sum in London and Turkish piastres in Beyrout, it was possible to calculate the exchange through the neutral country of Switzerland. By the time that Syria ceased to

be in possession of the enemy, and thenceforward till the war came to an end and thereafter, the value of the piastre greatly depreciated.

The defendant bank then offered to pay the plaintiff an equal number of piastres to those which the bank had received when they handed over the several parcels of goods or—which came to the same thing—the sterling value of the depreciated piastres.

The plaintiff refused to accept this, and brought the present action for the sterling value of the several consignments, amounting in all to 3161*l.* 6*s.* 6*d.*, and he also claimed interest from a certain date.

Alternatively he claimed to treat the delivery of the several parcels as having become wrongful during the war and damages for the conversion.

The defendant bank pleaded the Turkish law precluding it from making payment to any person in Great Britain during the war, said that any previous agreement had become illegal or alternatively impossible of performance; that it had acted reasonably in parting with the goods, as otherwise there would have been charges for storage and insurance and the goods might have deteriorated and were liable to confiscation if they were held still to belong to the plaintiff, and said that it acted reasonably and in a businesslike way in collecting from the various recipients the equivalent of the sterling value; and it pleaded art. 84 of the Treaty of Lausanne, and said that under that article its liability was limited to paying now the sums as collected in Turkish currency.

Rowlatt J. gave judgment for the plaintiff for the sum sued for. He did not think it was a case of conversion or of giving damages for conversion; but he thought that, however the branch of the defendant bank in Syria collected the price of the several parcels, the defendant bank rendered itself accountable for the value in sterling in London, and that, though this could not be paid while the war suspended all payments, it did become payable when the war came to an end.

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There might have been some question as to whether the duty to pay first arose when the war came to an end, or whether it did not arise earlier when the Allies came into possession of Syria, but the plaintiff only asked for interest from March 13, 1919, and that date appears to have been accepted by the defendant bank, and judgment was accordingly given for interest as from that date.

The defendant bank appealed to the Court of Appeal. In this Court the learned Lords Justices thought that Rowlatt J. had put his judgment on a wrong footing, that the plaintiff would have failed if that were the only ground, but that the true view was that the defendant bank never should have delivered the parcels to the several recipients, and that the bank was therefore liable in damages for wrongful conversion, and they directed an inquiry into damages.

This view of the case would operate more hardly upon the defendant bank than the judgment of Rowlatt J., and the bank has accordingly appealed to your Lordships' House claiming that neither judgment is right, and that it is only liable for that which it has always offered, the present value of an equal sum in piastres to that which it had received.

The respondent in his printed case supported both judgments, but his solicitors had previously written to the bank's solicitors saying that he would be satisfied if he could hold the judgment of Rowlatt J.

My Lords, your Lordships at an early stage of the argument came to the conclusion that the judgment of the Court of Appeal, so far as it differed from that of Rowlatt J., could not be supported.

As each recipient came along in time of peace the branch of the bank at Beyrout was entitled to deliver to him his parcel of goods provided that the bank made itself debtor to the plaintiff for the proper sum in sterling in London. After the war had begun there was nothing unlawful in two parties, both subjects of the Ottoman Empire, dealing with each other. So far therefore there was nothing wrong in the bank delivering parcels to the several recipients. As between the branch bank in Beyrout considered as a Turkish subject

and the plaintiff as a British subject, all dealings were suspended during the war, and therefore the bank was not bound to carry out the plaintiff's mandate. But the plaintiff could not complain that his mandate was carried out. Indeed he may be presumed to have desired it. Provided that the proper payment was made in the proper manner, no harm was done; and the bank either in fact took proper payment in the proper manner or must be deemed to have done so. Indeed it not merely admits but contends that it did so. The plaintiff's case therefore must rest upon the judgment of Rowlatt J.

As far as the plaintiff was concerned, though he had framed his case in such a way as to claim the alternative relief given by the Court of Appeal, he was content, as already stated, with the judgment given by Rowlatt J. It was the bank who by appealing from this judgment brought upon itself the more severe order of the Court of Appeal.

My Lords, I think that Rowlatt J. was right. The bank escapes from a judgment for wrongful conversion of the goods upon the supposition that it took in return for them that which it was bound to take, a credit on London—a credit unavailable at the moment because things were put to sleep by the war, and therefore not producing interest during the war, but becoming available when the war came to a close. That which it could easily do through its machinery by the simple process of debiting the Syrian branch and crediting the London head office, it had, as soon as the war was over, to do; and therefore it is liable both for principal and for interest from the agreed date.

For the same reason the article in the Treaty of Lausanne, on which the bank relied, does not protect it. The bank cannot say that it collected the money "in a currency other than that mentioned in the contract," because the only way in which it can show that it performed its duty is by accepting the position that it took or procured or produced a London cheque.

For these reasons I am of opinion that the judgment of Rowlatt J. should be restored. As to the further costs from

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the date of his judgment, those of going unnecessarily to the Court of Appeal ought to be paid by the bank.

With regard to the costs of the appeal to your Lordships' House, this appeal was no doubt necessary, but it was necessary because the bank had brought an order of the Court of Appeal upon itself, and the bank was informed that the respondent would be content with the judgment of Rowlatt J. It ought therefore to pay these costs also.

LORD CARSON. My Lords, I have had the advantage of reading and considering the speech of my noble and learned friend upon the Woolsack, with which I entirely concur, and I do not desire to add anything.

LORD BLANESBURGH. My Lords, I find myself in entire agreement with the rest of your Lordships as to the proper result of this appeal. In reaching that conclusion however I have had a special difficulty of my own to overcome. To me, it has appeared that the very unusual terms in which the bills of exchange employed in these transactions were invariably couched had and were intended to have a meaning and effect, sufficient to invest the appellants' argument on art. 84 of the Treaty of Lausanne with a cogency which, had it not been neutralized by other considerations, might have carried their appeal.

As I read it the effect of the expression "value cheque on London" found in each of these English bills of exchange addressed to a drawee resident and carrying on business in Turkey was to make it incumbent upon the appellants' branch at Beyrout as their only duty to receive from the drawee in Turkish currency the amount which the bank accepted as the equivalent in value of the sum in sterling mentioned in the bill. This is, I think, the effect of the words, whether they are merely construed according to their natural meaning in the setting in which they are found or whether they are interpreted with due regard to the invariable course of dealing between the parties in these transactions and to the business requirements or convenience of one or other of them. It

was not, I think, supposed by anybody that payment for the bill in any other than Turkish currency would ever be made or asked for. Tender by the Turkish acceptor of a cheque on London, good, bad or indifferent, for the sum in sterling named in the bill, would not, in my view, have been such a payment as, in their natural signification, is connoted by the words used. Such a payment gives no effect to the word " value," which strikes me as the governing word in the phrase. It would, moreover, have failed to be a payment which in a business sense would have subserved either the interest or convenience of any of the parties concerned. And it is not without significance in this connection to note that an allegation originally made by the respondent's statement of claim that it was the duty of the appellants' branch at Beyrout to transmit to the respondent cheques on London so collected was, before the trial, at the respondent's own instance, struck out.

My Lords, in each transaction there were three parties concerned whose interests had presumably to be adjusted in carrying it to completion. There was, first of all, the respondent entitled, as the result of his arrangement with his Beyrout correspondent, to receive in England, in sterling if he so required, his agreed price for goods supplied. There were, next, the appellants, entitled normally in respect of their advances to the respondent to 80 per cent. of the sterling amount named in the bill, and interested, moreover, as exchange bankers to secure for themselves the ordinary profit on any exchange transaction involved. There was lastly the Turkish correspondent of the respondent, drawee of the bill, who, while in account liable to the respondent in sterling for the agreed price of the goods supplied, had for his own convenience to be enabled to discharge that liability by a payment in local currency made in Beyrout.

Only by an arrangement under which the appellants' branch at Beyrout collected from the respondent's Turkish correspondent the amount in Turkish currency which the appellants were ready to accept as the equivalent in value of the sum in sterling mentioned in the bill could either the

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convenience or the interests of the parties as so described have been met. But by it all were subserved. As the exchange rate accepted was the rate published by themselves, the appellants thereby secured their own profit on the transaction, viewing it as one of exchange, and they were also thereby left at liberty, so far as their own share of the proceeds of the bill was concerned, either to retain these in Turkey or otherwise dispose of them as their occasions, for the moment, dictated. In other words, so far as it touched the appellants' own interests, collection in Turkish currency was of the essence. That it was in accord also with the interest and convenience of the Turkish acceptor seems obvious; nor was it otherwise than to the interest of the respondent, for it might well have been, on occasion, highly useful for him to have his share of the currency proceeds applied or retained in Turkey on his account.

Accordingly, my Lords, if that were all, I should myself, on this interpretation of these bills of exchange, have difficulty in resisting the case made by the appellants on art. 84 of the Treaty of Lausanne. The currency "mentioned" in the contract is, I think, sterling, and the collection, although conventionally so made, has in fact been made in Turkish currency. But, in the circumstances, this is not, I think, enough for the appellants. It is to me clear that, as between the appellants and the respondent, the collection in Turkish currency actually made was only authorized, and, as between the respondent's Turkish correspondent and the appellants' Beyrout branch, payment in Turkish currency was only made, on the terms that thereupon and without any variation by reason of any subsequent alteration in the rate of exchange, whether up or down, the appellants became accountable to the respondent in sterling for the precise sum representing his final share of the additional sterling value of the bill. And in my view the effect of this term in the transaction was to make art. 84 of the Treaty inapplicable to the present case. In the result, therefore, I agree that the order of Rowlatt J. should be restored.

My Lords, I am satisfied that there was here no wrongful conversion by the appellants, and I am relieved to find that the respondent's alternative claim on that footing, a claim really unconscionable, cannot, for the reasons given by your Lordships who have preceded me, be supported. In ordinary circumstances it would accordingly have been proper that the costs of litigating that issue should have fallen upon him. But the respondent has throughout been ready to accept the order of Rowlatt J., and, as the appeals of the bank to the Court of Appeal and to this House have been brought really in order to obtain a reversal of that order, I agree in the view that, although the appellants have now succeeded in displacing the order of the Court of Appeal, they should bear the costs of both appeals, as the final result has been only to restore an order with which from its date the respondent was well content.

Order of the Court of Appeal reversed and judgment of Rowlatt J. restored. The appellants to pay the costs of the action in the King's Bench Division and the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 1, 1928.

Solicitors for the appellants: *Bischoff, Coxe, Bischoff & Thompson.*

Solicitors for the respondent: *Pritchard, Englefield & Co., for Brett & Co., Manchester.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 May 11.

BUSBY AND ANOTHER . . . . . APPELLANTS;

AND

AVGHERINO AND OTHERS . . . . . RESPONDENTS.

Tithes—City of London—Rate prescribed by Statute 37 *Hen.* 8, *c.* 12, *and Decree thereunder—Customary Payment—Payment of less Sum than prescribed Rate—Onus of Proof.*

By the statute, 37 Hen. 8, c. 12, passed in 1545, intituled an "Act for Tithes in London" and a decree made thereunder, which by the statute was declared to have the force of an Act of Parliament, it was directed that the tithes of the City of London should be computed at the rate of 2*s.* 9*d.* upon every 20*s.* of the rent of the premises in respect of which tithes were payable, but by cl. 18 of the decree it was provided that where less sums had been accustomed to be paid for tithes, tithes only after such accustomed rate should be paid.

In an action brought by the owners of tithes in respect of the premises No. 15 Great St. Helen's, Bishopsgate, against the occupiers thereof for tithe at the prescribed rate, the defendants pleaded that the sum of 19*s.* per annum was accustomed to be paid for tithes in respect of the premises at and before 1545, the date of the decree, and claimed the benefit of the exemption contained in cl. 18 of the decree:—

Held, (1.) that the onus lay on the defendants of proving that in 1545 there was a customary or accustomed payment for tithe in respect of their premises of a certain sum less than 2*s.* 9*d.* in the pound in order to bring themselves within the exception in cl. 18; (2.) (by Viscount Sumner and Lord Warrington of Clyffe; Lord Atkin dissenting), on the facts, that the defendants had not proved, either by evidence or presumption, a uniform and regular payment of a fixed sum less than 2*s.* 9*d.* in the pound and that consequently their claim failed.

Decision of the Court of Appeal [1927] 2 Ch. 33 reversed and judgment of Tomlin J. restored.

APPEAL from an order of the Court of Appeal (1) reversing a judgment of Tomlin J.

The appellants were the executors of the will of Mary Busby and as such were the owners of all the rectorial or freehold tithes issuing out of or payable for or in respect of such parts of No. 15 Great St. Helen's, in the City of London, as were situated in the parish of St. Helen's, Bishopsgate.

* *Present:* VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE, and LORD ATKIN.

(1) [1927] 2 Ch. 33.

The respondents were at all material dates lessees and occupiers of portions of the said premises, all of which were situated in the parish of St. Helen's.

By the statute 37 Hen. 8, c. 12, intituled "An Act for Tithes in London," and a decree made thereunder, the lessees and occupiers of houses and other hereditaments in the City of London were rendered liable to pay tithe at the rate of 2*s.* 9*d.* for every rent of 20*s.* by the year. By cl. 18 of the decree it was provided, in effect, that where a less sum than 2*s.* 9*d.* in the 20*s.* rent had been accustomed to be paid for tithes, then in such places the citizens and inhabitants should pay but only after such rate as had been accustomed.

The appellants sued the respondents for an account of all sums due to the appellants from the respondents in respect of the portions of the premises leased or occupied by them respectively for or on account of the tithes since March 25, 1921, calculated at the rate prescribed by the Act and the decree thereunder.

The respondents alleged that the sum of 4*s.* 9*d.* a quarter, or 19*s.* per annum, was accustomed to be paid for tithes in respect of the premises in question at and before the date of the decree, and they admitted liability to that extent only; and paid into Court the sum of 3*l.* 6*s.* 6*d.* to cover the tithes at that rate from March 25, 1921, to the commencement of the action.

The facts appear from the judgments of their Lordships.

Tomlin J. held that the onus was on the respondents to prove that a less sum than 2*s.* 9*d.* in the pound was paid in 1545 in respect of the premises, and came to the conclusion on the evidence that they had failed to discharge that onus; and he accordingly gave judgment for the appellants. The Court of Appeal (Lord Hanworth M.R., Sargant and Lawrence L.JJ.) reversed Tomlin J.'s decision. They agreed with the learned judge on the question of onus, but were of opinion that the true inference to be drawn from the facts was that in the year 1545 there was a customary payment for tithes of a less sum than 2*s.* 9*d.* in the pound, and they dismissed the action.

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1928. Feb. 27, 28; March 1. *Gerald Hurst K.C.* and *Collingwood* for the appellants. The burden is on the defendants (the respondents) to show a customary payment of 19*s.* Where over a long period of time, without regard to contemporary fluctuations of rent, the defendants have made a uniform payment of tithe below 2*s.* 9*d.* in the pound the inference is, in the absence of evidence to the contrary, that that was the payment in 1545. But there is no case in which a defendant has been held to establish such customary payment where the payments have varied from time to time. In order to succeed, the defendants must show some constant specific customary payment below the statutory rate. It is not sufficient to show that the statutory rate has never been paid. Upon the evidence Tomlin J. was right in holding that the extent of the liability to tithe of the defendants' premises remained in doubt and that it was impossible to infer that 19*s.* per annum represented any sum accustomed to be paid at or before the date of the passing of the statute.

[They referred to *Bramston* v. *Heron* (1); *Warden of St. Paul's* v. *Morris* (2); *Antrobus* v. *East India Co.* (3); *Warden of St. Paul's* v. *Kettle* (4); *Payne* v. *Esdaile* (5); *Esdaile* v. *City of London Union.* (6)]

Herbert Preston K.C. and *Lionel Cohen* for the respondents. Assuming that the onus is upon the respondents to establish a customary payment for tithes less than 2*s.* 9*d.* in the pound of the rent they have discharged that onus. The Court of Appeal were justified in holding on the evidence that the respondents had established that 19*s.* had been accustomed to be paid for tithes in respect of the premises in question for a period of nearly two centuries and that the proper inference to be drawn from such payments was that that sum had been accustomed to be paid in and before 1545. In *Foster* v. *Plumbers' Co.* (7) Buckley J. held that a

(1) (1787) Gwil. 1314.
(2) (1803) 9 Ves. 155, 171; affirmed by the House of Lords. See p. 171 note.
(3) (1806) 13 Ves. 9, 18, 19.
(4) (1813) 2 Ves. & B. 1, 15.
(5) (1888) 13 App. Cas. 613, 621, 622.
(6) (1887) 19 Q. B. D. 431, 441.
(7) Unreported, January 25, 1900.

customary payment of 16*s.* per annum was established under very similar circumstances.

[They also referred to *Williamson* v. *Gosling* (1); *Bennett* v. *Trepass* (2); *Shephard* v. *Payne.* (3)]

Gerald Hurst K.C. replied.

The House took time for consideration.

1928. May 11. VISCOUNT SUMNER. My Lords, the rectorial and freehold tithes, payable in respect of 15 Great St. Helen's, E.C., are vested in the plaintiffs, whose title is not contested, and the defendants, as occupiers of that tenement, are bound in respect of it by 37 Hen. 8, c. 12, and by cl. 2 of the decree, which it incorporates, to pay or make payments in the nature of tithe at the rate of 2*s.* 9*d.* in the pound of yearly rent, unless cl. 18 applies, which by way of proviso enacts that in places where less sum than after 2*s.* 9*d.* in the pound rent hath been accustomed to be paid "the said . . . . inhabitants shall pay but only after such rate as hath been accustomed." In principle the burden of establishing such a customary payment must rest on those who set it up, because it is a particular exception out of the general charging provision made for all cases where no such customary rate exists, and it has long ago been laid down in the decided cases that such a defence must bear the onus of proof: *Bennett* v. *Trepass* (4); *Warden of St. Paul's* v. *Kettle.* (5) I need not elaborate them.

The burden is a very real and a heavy one. The impropriator is entitled to the statutory charge unless an accustomed rate can be proved, applicable to the tenement in question and existing in respect of it in A.D. 1545. We need not now trouble with the length of its anterior existence. If it can be carried back to the time when the Act passed, under the circumstances of this case that will do. We need not go back to Richard I.

(1) (1762) Western, 152; Gwil. 902.
(2) (1722) Western, 125, 133; Gwil. 633; 4 Bro. P. C. 650.
(Also spelt *Bennet* v. *Treppass.*)
(3) (1864) 16 C. B. (N. S.) 132.
(4) Gwil. 633; 4 Bro. P. C. 650.
(5) 2 Ves. & B. 1.

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Proof is required but it is hard to come by. The rules of evidence are liberal in matters of such antiquity, but they remain rules of evidence and, with every willingness to admit all such inferences as can properly be drawn, we must distinguish clearly between reasonable inference and plausible conjecture. The defendant must have the benefit of all legal presumptions, but he can take nothing by any resort to mere surmise, however ingenious, and his proof, though scanty, must still be "rational and solid": per Lord Eldon L.C. in *Warden of St. Paul's* v. *Morris*. (1)

It is not only the pedigree of the accustomed payment that must be proved, but its amount. The tithepayer has to pay something, whether on the footing of the statutory rate on his rental value or under cl. 18. It is for him to show what the sum is; otherwise he fails. I think there is a further material consideration in connection with this burden of proof. The tithepayer cannot succeed merely by reason of the weakness of the titheowner's evidence. In aid of his own affirmative case he can make use of the barrenness of the claimant's, but if the claimant proved nothing, the occupier would still have to trace his accustomed sum back to 1545. It follows that a very different significance attaches to weak spots in the defendants' claim from that, which at most can arise from gaps in the case of the titheowner. The latter is under no duty nor is it much to his interest to keep documentary records of transactions in the past. The statute of Henry VIII. is his charter, and, the more rental values have varied, the less can it matter to him what actual sums have been paid in particular past years. With the tithepayer it is otherwise. His interest has been all along to preserve documentary evidence of the continuous payment of an accustomed sum, and he and his predecessors have disregarded it at their peril. A dozen receipts at suitable intervals for 19*s*. (which is the sum to which the defendants pledge themselves), "being the tithe as anciently accustomed due from X. Y.," would have concluded the matter. Equivalent evidence will serve, but mere comment on the claimants' shortcomings avails nothing.

(1) 9 Ves. 155, 170.

At the trial extracts from various books and papers, forming part of the Vestry archives, were produced, and were to the following effect. In 1632 one Thomas Jennings paid, along with others, a sum for five years' tithe in advance which makes his annual tithe 35*s.* and in 1654 he is entered as liable to pay the same amount in respect of a tenement, which, it is reasonably plain, included the site of what is now No. 15 Great St. Helen's. It is common ground that in these two entries Thomas Jennings is the same person and the 35*s.* is payable in respect of the same tenement. In 1705 Henry Durley appears as liable for an annual payment of 19*s.* The respondents' case is that this 19*s.* was arrived at because five houses, of which Thomas Jennings's house of 1632 was one, were so altered as to become six. This it is settled would not, in itself, break the continuity or uniformity requisite to an "accustomed sum" within cl. 18: *Williamson* v. *Gosling*. (1) The rearrangement of the sums payable is another matter. In 1714 the house is again entered as liable to the same payment, the tithepayer's name now being Jane Bowie. The record of 1714 was printed in 1795, though here Jane Bowie's payment is 16*s.* In 1822, on the occasion of a sale of the tithe, the particulars of sale show the house in the occupation of one Tottie, with 19*s.* as the sum payable, and it has been assumed, though I think without any direct evidence, that Tottie must actually have paid it, but for how long does not appear. Another statement got out from the records of the parish by two assistant overseers for the purposes of this case shows actual payments for this house, then occupied by a wine merchant named Page, from midsummer, 1796, to midsummer, 1807, of only 16*s.* per annum. There is no material to bridge the gap between 1807 and 1822 or between Page and Tottie, so far as extracts from original documents go, but a quotation from Cox's Annals of St. Helen's, which was admitted without objection, as were all the other documents in the record, throws some light on it, if the author was well informed. It appears that about 1805 the Reverend Edward Cooke bought these tithes for under 700*l.* from a predecessor

(1) Gwil. 902.

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named King, who had bought them for 505*l.* in 1795. He sold them in 1822 by public auction for 6300*l.* The tithe payable, according to the records of 1714 and 1795, above mentioned, had been rather over 64*l.* 6*s.* per annum. On a comparable basis for the return from such an investment, it must have been increased to something like 560*l.* The explanation given is that Mr. Cooke was a hard man and perhaps no great credit to his cloth. He screwed up the tithe; he bullied the tithe-payers, and he spoke disrespectfully of Chief Barons of the Exchequer. It is not, however, necessary to suppose that he got more than his rights, or that the occupiers were forced by his resolution to abandon pretended but groundless claims to a customary payment. The erection of new buildings on ground never built on before or on the site of sheds, which were not liable to tithes, may explain it: *Bramston* v. *Heron.* (1) In 1822 the particulars of sale state that there were thirteen houses, of which No. 15 was one, in respect of which the tithe payments were called customary, but, adds the document, they were not all so admitted by the vendor. Extracts from statements of tithe for 1841, 1854, and for two later years, not named, show that in these years the sum of 19*s.* had been raised to 40*s.* This is stated to be "by composition" with the tenant at some date earlier than 1841. They distinguish between payments under composition and customary payments, and No. 15 now comes under the former and not under the latter head. The collector, who drew up the document of 1854, has a significant note: "Statement of the Tithes of St. Helens parish, showing as far as yet ascertained what are payable under leases agreements and composition. The remainder some being customary payments, the majority payments acquiesced in and received but subject to increase. It appears by the old payments they have varied as to a large portion. In these cases therefore there can be no customary payments."

With this extract there should be compared the document, which shows how this series of parish records originated. Shortly before the Restoration the tithes were in the hands of

(1) Gwil. 1314.

one John Langham, who commenced proceedings by English bill in the Exchequer against Spurstowe and others. He alleged that they occupied premises, for which, "either by Custom some rate or customary payment or sum of money either according to the yearly rents or values" of those premises "or otherwise had been used to be yearly paid at certain times to the proprietors or farmers of the said Rectory or else according to the decree made for payment of tithes in London" in 1545. The Court then made an order for the trial of a feigned issue at law, in which Spurstowe and his co-defendants were put to proof of the custom and customary payments on which they relied in answer to the plaintiff's claim. This issue was never tried, but, in February, 1662, an order was made by consent, by which the defendants were to pay, according to the several rates and customary payments set forth in their several and respective answers, and the decree concluded, "and shall continue the payment of the same for the future accordingly for so long as the said plaintiff shall continue Impropriator of the said rectory and the said defendants each one respectively shall continue inhabitants of their respective houses."

The recitals show that the plaintiff (how far truthfully we cannot tell) accused the defendants of conspiring to defeat his just claims by concealing from him in concert the true and improved rents of the houses and the alleged customary sums that they had been in the habit of paying and the ancient rents, according to which they claimed that their rates of payments should be fixed. It is accordingly not clear that the defendants' contention was rested under cl. 18 on sums "accustomed" in or before 1545 and not rather on ancient rents then and previously payable, to which, notwithstanding any increase in the value of the premises, they contended that the 2*s.* 9*d.* was alone applicable. Their respective answers are not forthcoming. Thomas Jennings was not a party to these proceedings at all. The suggested reason, namely that he was a man too honest to conceal anything, who made a clean breast of his 35*s.* and so got its customary character acknowledged, strikes me as being ingenious but fanciful.

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The Vestry, however, took the matter up, apparently considering this settlement, though only a personal one between the parties themselves, to be of general importance to the parish. The Old Register Book, dated 1705, contains a comparative tabular statement setting out for 1654 and 1705, respectively, along with the quarterly sums payable, the names of a number of occupiers, far beyond those, who were defendants in 1662, and adds indications of changes made, when the number of the houses was increased or diminished by alterations in them, which resulted in new allocations of payments. It is headed rather inaccurately, "A tithe book for St. Helens parish, reduced to a settlement made by a decree in the Court of Exchequer, 9th February, 1662, in a cause between Sir John Langham, plaintiff, and the Parishioners of the said parish, defendants, as the same appears by tithe books bearing date 1653 and 1654, which were made exhibits in the said cause on behalf of the said parishioners."

My Lords, I think that from this it may reasonably be inferred that on some ground, now unknown, it was generally thought among the Vestrymen of 1705, that the settlement of 1662 was valuable to them, as securing parishioners generally from increases in the sums payable in respect of tithe and that an elaborate record was made up accordingly. On what this was founded we do not know. The personal settlement of the action is apparently relied on, for, rightly or wrongly, the actual named defendants are spoken of as if they had defended on behalf of all other parishioners; apparently also there were either no earlier records, except the list of 1632, or they did not carry matters so far as the decree did, nor is there anything before us to show that any information then existing with regard to the period before 1654 contained anything to connect the payments of that day with the customs of 1545, except by mere conjecture. At any rate the parish "Paper Book" for Vestry orders, which was first directed to be kept in 1558, has not yielded anything further for use in this case.

This history, extending over nearly two hundred years, is in the amount of its information probably all that could have

been expected. It was admitted at the hearing, though I do not know on what material, that payment of 19*s.* per annum had been made from 1705 to 1714. Of course, nobody supposes that some payments were not made in other years between 1632 and 1822, though it is equally improbable that there were no years in which the tithe for No. 15 went unpaid. This, however, is not the serious part of the case, for it is not non-payment but variable payment that must weaken and may destroy the defence to the titheowners' claim: *Andrews* v. *Drever* (1); *Payne* v. *Esdaile* (2); *Esdaile* v. *City of London Union.* (3)

So much for the positive side of the respondents' case. In view of this affirmative evidence the absence of evidence contra becomes negatively important. (1.) There is no direct proof of any payment that can be shown to have been calculated at 2*s.* 9*d.* in the pound on any known rent. (2.) Neither 35*s.* nor 19*s.* nor 16*s.* represents, at 2*s.* 9*d.* in the pound, any rent exactly expressible in current coin of the realm without fractions. (3.) No rent, but one, is directly proved for No. 15 or for Thomas Jennings's larger holding and that is 50*l.*, reserved by lease to John Page for twenty-one years from Christmas, 1789. An attempt was indeed made to show that 50*l.* must also have been the rental value nearly one hundred years before, when the first valuation was made for Land Tax. I think this failed. It rested on the assessment for Bishopsgate Ward for 1793, when 8*l.* 15*s.* "to pay" was attributed to Page, 50*l.* being put opposite his name, almost certainly as the value on which that sum was payable. Why any value should be entered in 1793 does not appear. None is mentioned in such previous documents as we have. The suggestion was made that, though the record of the actual valuation for Bishopsgate Ward is missing, still, as the original valuation to Land Tax in 1692 was the only one ever made, it must be supposed to have been repeated in all subsequent assessments, and that, as that valuation is stated by historians to have been careless and dishonest, 50*l.* must be taken to have

(1) (1835) 3 Cl. & F. 314. (2) 13 App. Cas. 613.
(3) 19 Q. B. D. 431, 441.

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been too low a value even at the end of the seventeenth century, for all the mistakes must be deemed to have been made against the Crown. For my part I am not satisfied that 50*l.* in the assessment of 1793 is meant to be the original valuation to Land Tax at all and, if so, it carries us no further. (4.) Finally from first to last, there is no record or even evidence of any litigation between the impropriator of the day and the successive tenants of No. 15 or of the tenement of Thomas Jennings for the recovery of any sum for tithe. Whether they did not pay or did not pay enough, there is a complete absence of any proof that any attempt was made to collect more by process of law and, until the Reverend Mr. Cooke came on the scene, there is no proof that the impropriator ever pressed for more than he was getting.

How far then, if at all, does this fall short of satisfying the burden of proof, which rests on the respondents ? For the period from 1871 to the commencement of this action it is enough to say that nothing is proved either way. Tithe, as such, was not then being collected from tithepaying occupiers. Some family arrangement took its place, and the former position is unaffected. In the period before 1871—the period of the 40*s.* payments by arrangement, preceded by several years, in which no payment is recorded at all—it is the surmise of the Court of Appeal that the tithepayer may have paid this greatly increased but still unimportant sum rather than go to the cost and expense of contesting it. That may be, but, the same explanation applies equally in earlier centuries in favour of the titheowner and unless the 19*s.* is established between 1545 and 1822, it leaves things as they were. Between 1714 and 1795 or earlier, he may have arranged to take 19*s.* for the time being, rather than go to law. This was the explanation which commended itself to Tomlin J. Acquiescence, so explained, does not evidence an origin for the 19*s.* payment dating from 1537 or 1545.

In the period between 1705 and 1822 fall the years when 16*s.* was apparently the sum that was recognized. Prima facie it is evidence that the 19*s.* was not a uniform customary sum, but the tithepayer is at liberty to explain it, if he can.

It might be due to compassion for the poor; it might be due to simple error. It is the latter explanation that is selected and I will briefly point out how speculative it is.

The printed list of 1795 purports to be a correct copy of the list exhibited in the Vestry since 1714. It is not. Jane Bowie's payment is sixpence down; Philip Sandford's is threepence up. The spelling varies; sometimes for the better, sometimes for the worse. A careless printer is likely enough; a careless vestry, spending their money for the general information of those concerned and letting two slips in the figures pass, which might get the tithepayers into some trouble, is also possible, but both negligences have to be assumed. The error has then to be connected with the subsequent collection of 16*s.* only and the hypothesis is that the sale of the tithes, then said to amount to 64*l.* 10*s.* 6*d.* per annum, which took place in 1795, was based on this printed copy as the particulars of sale, and that the new impropriator, knowing no better, only asked Mr. Page for 4*s.* a quarter. This Page paid. He dissembled his satisfaction and held his tongue. How this impropriator settled the matter, when he sold out to Mr. Cooke, we do not know, but of course in itself the sum was trivial.

My Lords, I cannot see on what ground it is to be assumed that this sale took place merely on the basis of the print of 1795. Most, if not all, of the names of the tithepayers had, as an examination of the Land Tax documents shows, been changed in the intervening eighty years. Wensley's house in 1796, afterwards Cooper's in 1822, was a composite of Bailey's and Best's houses of 1714. Barbara Drew's house of 1714 had been divided into two between Robinson and Rawlinson by 1796. The undated "Schedule of customary payments, with Mr. Cooke's remarks," shows that he thought the print of the particulars was inaccurate with regard to Nos. 18 and 17, Ximenes and Debarry of 1714, the sums payable having been differently distributed between them. The significance of his list is this, that, according to him, the tithes of St. Helen's, which were "claimed to be customary payments pr. order of the vestry of December 16th, 1714,"

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but not admitted by himself, were only Nos. 1 to 19 Great St. Helen's inclusive, out of all the 112 houses in the 1714 list. It would seem that either new building or his operations had cut down the claims to customary payments, to about one-sixth of the whole, and, if he had remained owner a little longer, the present dispute might never have arisen.

My Lords, I think it very unlikely that a printed document, in which the names were all obsolete, would have been used as the sole basis for collecting the tithe after the purchase. The houses were not numbered, so far as we know, in 1795. Numbers first appear in Mr. Cooke's schedule. Identification of the houses by the names of householders long dead would have been impossible. It is much more likely that by employing the former collector or by local inquiry of his own the new impropriator found out and got in what the parties had been recently paying. If so, the 16*s.* is not a payment in error but a payment varying from the 19*s.*, which remains unexplained. It is not for the claimant to explain it. The occupier of No. 15 may have been impecunious or a bad payer. The latter is not unlikely, for I note that in eleven and a half years the then owner of the tithe only got forty quarters' payment out of Mr. Page, and only about thirty-five out of Mr. Wensley. The underpayment may have been a "usurpation of a deficiency" (*Shephard* v. *Payne* (1)) which Mr. Cooke refused to submit to though his predecessors had done so. All I can say is that the evidence leaves the explanation in doubt and by any doubt on the point the respondents must suffer.

The respondents must further trace the pedigree of their 19*s.* to and through Jennings and so back to 1545. The difficulty, which I think is unexplained, is this. Between 1654 and 1705, when or how we do not know, five houses, of which Jennings occupied one, became six. From 1705 onwards these six houses always appear in the same order with Richard Stert at one end and John Boteler (afterwards Anthony Bailey) at the other. They appear to have stood as a consecutive series. I judge from the respondents' tracing of a recent ordnance map, that this block is almost an island

(1) 16 C. B. (N. S.) 132.

site and is all but surrounded by thoroughfares for pedestrians. Accordingly, if these thoroughfares are ancient, as doubtless they are, the half-dozen houses were not built in a row but filled up the site in some other way. Still, as they had to open on to some thoroughfare, the natural way of arranging the names in order and eventually of numbering them would be by taking one door after another in sequence. Now Crew and Durley are two householders, who between them make up most of Thomas Jennings's 35*s*. Stert makes up the residue. Boteler, Somaster and Deane continue to pay as their predecessors did in 1654. How could Stert be the person, on whom part of the 35*s*. was cast, if it was a genuine reapportionment of an ancient accustomed sum? Between Crew and Stert two other houses intervened, and they continue tithed as before. I find it very difficult to see how Durley's 19*s*. is identified, as it has to be for an old customary pedigree, with a part of the older 35*s*., for the break up of the 35*s*. is only accomplished by something (it is not for me to say what) which is much more like some private arrangement than a mere consequence of turning Jennings's single house into two others. Nothing but conjecture is available to the respondents here. It is, indeed, contended that an actual and sufficient appropriation of 19*s*. to Durley's house may be inferred from the long uncontested payments of that sum without dissent on the impropriator's part, but I think that the payments themselves, except between 1705 and 1714, are too conjectural to found such an inference.

There remain the eighty-seven years between the first appearance of the 35*s*. and the last date, 1545, in which an accustomed sum could have arisen under cl. 18. Whatever the circumstances, under which the 19*s*. payment came into existence, they do not serve to show that the 35*s*. payment was a customary payment going back to 1545. The judgment in *Foster's* case (1) in 1900 was cited as authority for relying on tradition in a proper case. I do not dispute it, but is this such a case? In a family the memory of a striking event may last for generations, and in public affairs for centuries. If

(1) Unreported. Buckley J., January 25, 1900.

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Jennings had been shown to have belonged to a family resident at No. 15 for a century, a tradition that his grandfather had been burnt at the stake in one reign or drawn and quartered in another would be likely to persist even without the addition of a ribald ballad on the subject. Here, however, there is no question of one family but of a succession, probably numerous, of householders, not so far as we know connected together, and the fact to be remembered is neither public nor material, but is the prosaic circumstance, interesting only to the parties, that, beginning at latest in 1545, a precise sum, 35*s.*, and no other had been payable, because it was accustomed in and before that year and did not rest on any other foundation. For this I think tradition is an impossible basis. It should also be borne in mind that, as between the impropriator and the tithepayer, the issue was not necessarily confined to 2*s.* 9*d.* in the pound of the rent, then payable, or else an accustomed lump sum. For a long time it was in dispute what the "rent" was on which the 2*s.* 9*d.* was to be reckoned. Long after the actual history of No. 15 Great St. Helen's begins, it was still being contended that the rent to be tithed was the old Tudor rent, and the right to reckon the rate on the improved rent for the time being was not fully established till Lord Eldon's time: *Ivatt* v. *Warren* (1); *Antrobus* v. *East India Co.* (2) This must be why in *Langham* v. *Spurstowe* (3) the occupiers concealed the amount of their rents and, as above stated, sometimes rested their contention on a fixed sum and sometimes on a fixed rent. Even if an oral tradition is postulated, which handed down from tenant to tenant the fact that 35*s.* had always been the sum payable, this would still leave the origin of that sum to be supplied by memory, and this seems to me exceedingly problematical. Again tradition is not very likely to have discriminated between an origin before 1545 and an origin after it. The numerous traces of some standing quarrel about the tithe on the buildings in Great St. Helen's and of the importance of adhering to traditional payments are just as likely to be due to resistance to payments based on improved rents as

(1) (1618) Gwil. 1054. (2) 13 Ves. 9, 24, 25. (3) P.297, ante.

to insistence on a supposed accustomed sum payable since the time of Henry VIII. We are not informed whether the Great Fire extended to Great St. Helen's or not, but the time of acute dispute would come when the time of rebuilding began, then or afterwards. Till then mediaeval tenements might well lose value, as they aged, as fast and as much as the site itself grew more valuable, and thus leave the payable rent unchanged for generations, and it must be remembered that, as rent not fines are tithed, if a fine was taken on renewal and the old rent left, any increase of letting value would be accounted for.

My Lords, the Court of Appeal, sensible of the difficulty presented by this gap of eighty-seven years, considered that there was a presumption of a legal origin for a state of things found to exist so long ago as the seventeenth century. As it was put to your Lordships at the bar, that state of things must be deemed to have originated "in right and not in wrong." I think this application is fallacious. Such a presumption does not extend to presuming a date, nor are we here concerned with quieting title or giving validity to something, which has been in long and uninterrupted use, nor is the presumption required to invest with legality something, which otherwise would be unexplained and without the law: *Jenkins* v. *Harvey* (1); *Shephard* v. *Payne*. (2) In the first place the origin would be equally legal whether it was before 1545 or after it, but if after that date it would be inefficacious. In the second the choice of an origin here does not lie between a right and a wrong, but between two legal origins each, if established, equally good. 2*s*. 9*d*. in the pound on the rental or an accustomed payment of a lump sum would equally serve as a root of title for what is proved later on, but the difficulty is to know which it is to be. You cannot say that 35*s*. would be "in wrong" of the impropriator unless it is deemed to have been an accustomed payment in right of the occupier, until it is first certainly known that the 35*s*. could not itself be a payment arrived at on the basis of a rate—not necessarily the maximum rate—on an actual rent. I think it has been

(1) (1835) 1 C. M. & R. 877, 894. (2) 16 C. B. (N. S.) 132.

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far too readily assumed that 35*s.* could never have been the sum payable on the basis of the impropriator's claim in and after 1545. 2*s.* 9*d.* certainly is a rate often likely to lead to awkward fractions, either in the rent or in the payable tithe, but there is not much difficulty with 35*s.* An impropriator does not lose his rights altogether by accepting something less than his full due. On a rent of 12*l.* 15*s.* he could collect at 35*s.* his full 2*s.* 9*d.* tithe less only about three farthings, and that as a sensible man he would of course forego. This is a likely legal origin for Jennings's payments, but at any rate I do not think that the respondents proved, either by evidence or presumption, that uniform and regular payment of a fixed sum, which is necessary if they are to succeed. I think the appeal should be allowed, and the judgment of Tomlin J. should be restored, and so I move your Lordships.

LORD WARRINGTON OF CLYFFE (read by LORD BLANESBURGH). My Lords, the appellants, the plaintiffs in the action, are the lay impropriators of the tithe payable in respect of (amongst other hereditaments) the house known as 15 Great St. Helen's, in the City of London. The respondents, the defendants in the action, are the occupiers of various portions of the house. The title of the appellants and the liability of the respondents to the tithe, whatever be its legal amount, are not in dispute.

The question is whether the tithe is a customary sum of 19*s.* per annum or whether it is the full sum of 2*s.* 9*d.* for every pound of the annual rental of the house.

This question was decided in favour of the appellants by Tomlin J., but his judgment was reversed in the Court of Appeal. Hence the present appeal to your Lordships' House.

By a decree dated February 24, 1545, made by Thomas Lord Archbishop of Canterbury and others in pursuance of a statute of the same year, under which such decree has the same effect as an Act of Parliament, it was decreed that the citizens and inhabitants of the City of London should yearly pay their tithes to the parsons vicars and curates of the

City and their successors after the rate following, to wit, of every 10*s.* rent by the year of all and every house and houses and so forth 16½*d.* and of every 20*s.* rent by the year of all and every such house and houses and so forth 2*s.* 9*d.* and so above the rent of 20*s.* by the year ascending from 10*s.* to 10*s.* according to the rate aforesaid. It was also provided that the tithe should be paid quarterly at Easter, St. John the Baptist Day, Michaelmas Day and Christmas Day by even portions. The decree contained the following proviso (cl. 18) : " Provided also, and it is decreed, that where less sum than after sixteenpence halfpenny in the ten shillings rent or less sum than two shillings ninepence in the twenty shillings rent hath been accustomed to be paid for tithes ; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed."

It is now settled by authority (1.) That the expression " places " includes individual houses ; (2.) That the custom referred to is not an immemorial custom, but it is sufficient if it be proved to have existed in 1545 and for eight years previously. Speaking generally, in modern times, 1545 is taken to be the date as at which the custom must be proved to have existed ; (3.) That the custom may be inferred to have existed at that date from evidence of the regular payment in more recent times of a certain sum less than 2*s.* 9*d.* in the pound of the annual rent.

The respondents have pleaded that in their case the less sum payable in respect of their house is 19*s.* per annum or 4*s.* 9*d.* per quarter, and the question therefore is whether such sum was accustomed to be paid in respect of the house, No. 15 Great St. Helen's, in 1545 and the few previous years.

As to the onus of proof, it is in my opinion clear, on the form of the decree, that it is on those who seek to establish a special custom to pay a less sum than that made generally payable under the earlier part of the decree. But, however this may be, the question is settled by authority, and there is an end of it.

Does then the evidence adduced by the respondents bring to my mind the conviction that the sum of 19*s.* per annum,

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no more and no less, was accustomed to be paid in respect of the house in question in 1545 and the few preceding years. I have come to the conclusion, as did Tomlin J., that the evidence leaves the matter in doubt, and I am therefore compelled to hold that the alleged custom has not been established.

As to the house in question and its successive occupiers the following facts are, I think, found or admitted. In 1632 one Thomas Jennings was the occupier of certain houses of which one was the predecessor of No. 15. He was also the occupier of the same houses in 1654. In 1705 the house now represented by No. 15 was in the occupation of Henry Durley and it and the other house or houses making up the total occupation of Thomas Jennings were included in the group of six houses appearing in the tithe book hereinafter mentioned. By 1714 Jane Bowie had become the occupier of No. 15 and the same name appears in a list of 1795. In 1796, however, and for ten years thereafter we find the tithe being paid by one Page and in 1822 by one Tottie. Since 1822 the house has been in the occupation of various tenants, whose names need not be mentioned.

I now come to the evidence of payment. In 1632 there is a document recording the payment by certain persons of "five years' tithe beforehand," beginning at Christmas, 1632. In this list is included the name of Thomas Jennings as making a payment of 8*l.* 15*s.*, being five years at 35*s.* a year—namely, 8*s.* 9*d.* per quarter. There is no evidence on the question whether this is a payment in respect of what was then a single "place" within the meaning of the decree or whether it was the aggregate of payments in respect of several places. Assuming in favour of the respondents that it represents an alleged customary payment it cannot, for lack of evidence, be treated as the aggregate of several payments, but must, I think, be regarded as a single payment of 35*s.* in respect of the "place" occupied by Jennings.

The next material date is February 9, 1662, that of the decree of the Court of Exchequer on an English bill exhibited by Sir John Langham, the lay impropriator, against Sir

John Lawrence, and a number of other tithepayers, amongst whom the name of Thomas Jennings does not appear. The defendants by their answers set up claims to be entitled to make customary payments only and the suit appears to have been compromised, for it was heard on bill and answer, and a decree was made by consent. The effect was that the several defendants were to make the alleged customary payments to continue for so long as the plaintiff should remain the impropriator and the defendants should continue to be inhabitants of their respective houses and so forth. This therefore settled nothing; it shows that the existence of the alleged custom was then a matter of dispute.

The next document is dated April, 1705, and is entitled "A tithe book for St. Helens parish reduced to a settlement made by a decree in the Court of Exchequer 9th February 1662 in a cause between Sir John Langham, Plaintiff, and the Parishioners of the said Parish, Defendants, as the same appears by tithe books bearing date 1653 and 1654 which were exhibits in the said cause on behalf of the said Parishioners." Comparing this description of the decree with the copy of the decree itself the compilers of the book appear to have misconceived both the nature of the suit and the indecisive effect of the decree.

The book itself is divided into columns the left hand group of which purports to represent quarterly sums payable by a large number of persons in 1654, while the right hand group purports to represent the sums payable in respect of the same premises respectively by persons in 1705 with a final column for the annual sums representing the several quarterly sums. In the columns relating to 1654 there is a group of five persons of whom Thomas Jennings is one. The quarterly sum against his name is 8*s*. 9*d*. and the total of the several payments in the group is 1*l*. 0*s*. 6*d*. Under 1705 there appears a note "now six houses viz." and there follow the names of six persons, including Henry Durley with 4*s*. 9*d*. against his name. The sums set against the six persons amount to the same total as those set against the five persons under 1654, namely, 1*l*. 0*s*. 6*d*. The entries in this book seem to me to confirm the view that

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in 1632 and in 1654 the 8*s.* 9*d.* was a single sum payable in respect of one house, that house being between 1654 and 1705 split up in some way, part, that which is now No. 15, being then occupied by Durley, and the residue being apparently as to the bulk occupied by Dudley Crew and a small portion added to Stert's occupation, the sum payable by him being increased by 6*d.*

This is the first appearance of the 19*s.* a year. As to how or by what authority the 35*s.* previously paid in respect of Jennings' holding got split up into 19*s.* for Durley's, 3*s.* 6*d.* for Crew's, and 6*d.* for Stert's there is not a particle of evidence. I might stop here, for I think, on the facts already stated, there is no evidence of such a sum as 19*s.* being payable as a customary payment in or before 1545 ; if it really was a separate payment included in the larger aggregate of 35*s.* it was incumbent on the respondents to establish the fact. At present all we have is a payment in 1632 of 35*s.* per annum for property which included No. 15 with a statement that in 1705 a smaller sum of 19*s.* was payable in respect of No. 15 alone.

But from this, its first appearance, the 19*s.* has such a chequered career that I am driven as shortly as may be to say something of its history.

It is admitted by the appellants that it was in fact paid from 1705 to 1714 inclusive.

In the year 1714 it was ordered by the Vestry that the modes or accounts of tithes payable to the impropriator by the inhabitants of the parish be transcribed and hung up in the Vestry that the said inhabitants at any time may have recourse unto.

This order was apparently complied with by the preparation of the " Engrossment " printed at p. 52 of the appendix and hung up in the Vestry. In this Engrossment the name of Jane Bowie, the tenant of No. 15, appears and against it there is entered a quarterly sum of 4*s.* 9*d.*

In 1795 the Engrossment was printed by order of the Vestry, and at the foot of the print is a statement, signed by the churchwardens, to the effect that it is a copy of the Engrossment hanging in the Vestry " and which agrees as

to the rates with the rental entered in the old Register Book amongst the records of the Parish."

In this print the quarterly sum set against the name of Jane Bowie is 4*s.* and that sum and no more was paid from 1796 to 1807 inclusive.

It is said that the entry in the printed copy of the Engrossment of 4*s.* against the name of Jane Bowie was a mere printer's mistake. It may be so, but this is pure conjecture. Assuming it to be so it is remarkable that, though the Engrossment still hung in the Vestry, the payment of 4*s.* should have been regularly made, as it was, from 1796 to 1807. It at least shows that there was no certainty as to the amount of the alleged customary tithe.

The next date of importance is 1822. In that year there is a payment of 19*s.*, and in that year also the tithes were sold by Mr. Cooke, the impropriator, to one Alexander Macdougall.

The conditions of sale contained the following statements :—

"The tithes being payable under the Statute of Henry VIII. which allows the impropriator to claim to the extent of 2*s.* 9*d.* in the Pound on the rack rents of the houses, etc., the tithes, which are not customary payments, will be capable of very considerable increase. . . . .

"The following are claimed to be customary payments . . . . but are not all admitted to be such by the vendor."

There follows a list of houses and names including :—

"Great St. Helens,

"Bottom.

"House—Mr. Tottie—19*s.*"

It is common ground that Tottie was tenant of No. 15.

There was also put in evidence a list in Mr. Cooke's handwriting of uncertain date, but at all events of a date after that of the printed particulars, which are referred to therein. This list includes, in reference to No. 15, the name of Jane Bowie as the old occupier paying 4*s.* a quarter, and that of Mr. Vaile as the then occupier paying 19*s.* a year.

The particulars of sale are important only as containing mention of a claim to a customary payment of 19*s.* It contains

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no admission of the claim; on the other hand it does not state specifically that the claim was disputed.

The list does contain a statement that the sums mentioned were paid by the then present and former occupiers respectively, but the sums so paid are different in amount. It is another example of the uncertainty surrounding the present claim of the respondents.

After 1822 there is no evidence of any payment until 1834. From that date to 1870 there was paid a uniform sum of 2*l.* per annum. This would appear from the records to have been the result of an agreement between the impropriator and the occupier. Assuming this to have been the fact, it shows that the impropriator did not admit, and the tithepayer did not insist on his claim; the matter was treated as a question in dispute.

From 1871 to 1918 there was a uniform payment of 7*l.* 10*s.* per annum in respect of No. 15 and 4*l.* 17*s.* 1*d.* in respect of No. 10, making 12*l.* 7*s.* 1*d.* in respect of the two together, and for the years 1918 to 1921 this sum was increased to 15*l.* For the present purpose no importance attaches to these payments inasmuch as they were made not by the occupiers but by the owners of the houses and were the result of an arrangement between them and the then impropriator, who were relatives or connections.

As already pointed out the 19*s.* claimed to be accustomed to be paid in and before 1545 is not traced back further than 1705 except as part of a larger sum, and no evidence is given of its separate existence prior to that date. But independently of this point, which would, in my opinion, be fatal to the respondents' claim, the respondents have in my judgment failed to prove the regular payments of a fixed certain sum from which alone a custom can be inferred.

In the view I take of the evidence on the main question it is unnecessary to decide whether the respondents have proved that the 19*s.* a year was less than 2*s.* 9*d.* in the pound of rent. There is evidence that between 1789 and 1810 the rent was 50*l.*, but there is no further direct evidence of rent. The Land Tax records are not of much service, for at the best

they only lead to a conclusion as to the assessed annual value and not to the amount of the actual rent, and, even to arrive at the assessed annual value, there are unknown circumstances to be taken into account before a satisfactory conclusion can be arrived at from the sum actually paid for tax. If however it had been necessary to decide the case on this point I think I should agree with the view of the Court of Appeal upon it.

On the whole, in my judgment, the order of the Court of Appeal should be reversed and that of Tomlin J. restored. The respondents must pay the costs here and below.

LORD ATKIN. My Lords, the plaintiffs, claiming as owners of the rectorial tithe payable in respect of No. 15 Great St. Helen's, in the City of London, seek to recover from the defendants, the occupiers of those premises, the payments enacted by 37 Hen. 8, c. 12, the London Tithes Act of 1545. There is no question as to their title. The nature of the rights conferred by the Act has been frequently discussed in the Courts. Though the payments prescribed by the Act are called tithes, the term is a misnomer. The statute imposed the obligation upon occupiers of houses in the City to pay a sum based upon a rental in substitution for payments previously made by the citizens either voluntarily or in obedience to ecclesiastical decrees for the maintenance of the clergy. Possibly before the Act or its immediate predecessor, 27 Hen. 8, c. 21, such payments were civil obligations. They had existed for a long time. They took their source apparently in customary payments of $\frac{1}{2}d.$ for Sundays and Feast Days, and were patiently paid by city inhabitants until 13 Rich. 2, when the then Archbishop of Canterbury made an explanation of the constitution and obtruded upon the citizens of London twenty-two days more than were usual, which caused a constant struggle on the part of the citizens and a perpetual agitation between the ministers and citizens of London, the Court of Rome and in ecclesiastical courts. See the argument of Sir Thomas Coventry in *Dunn* v. *Burrell and Goffe.* (1) It was to allay this agitation that the Act

(1) (1617) Western, 77.

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in question was passed. But as Selden says, Tithes, Preface, ed. 1618, p. viii., the previous payments "could not properly be reputed among tithes, neither in regard of their value, nor . . . . in respect of their nature." He points out that in value they are more than tithe and in nature they are not gifts of increase, and concludes (p. xi.): "What is called Tithes of houses in London, is rather called so only than is at all so." We have only to deal with the statute, and the reference to previous payments is only of historical interest except in so far as it throws some light on the exception in the statute upon which the defendants rely. The exception is contained in cl. 18: "Provided also, and it is decreed, that where less sum than after sixteenpence halfpenny in the ten shillings rent or less sum than two shillings ninepence in the twenty shillings rent hath been accustomed to be paid for tithes; that then in such places the said citizens and inhabitants shall pay but only after such rate as hath been accustomed." Two points may be mentioned that have been the subject of decision on this clause.

1. An accustomed payment does not mean a payment made in accordance with a custom that goes back to the time of legal memory. In *Bennett* v. *Trepass* (1) the Court of Exchequer held that if there were tithes by custom or agreement for eight years past they are within s. 18 of that statute, and ordered an issue to be tried at law as to whether any sums less than 2*s*. 9*d*. in the 20*s*. rent had been accustomably paid by the defendants. This decree was upheld on appeal in the House of Lords. (2) On the other hand Lord Eldon in *Warden of St. Paul's* v. *Kettle* (3) lays down that the construction is not that it must be a payment time out of mind, but if that payment has been usually made during such time as to have acquired in the Ecclesiastical Courts the character of a customary payment the statute operates upon it. This would require payment for forty years in order to become customary. It is unnecessary to decide which of the two

(1) Western, 125. The reference should have been to cl. 18 of the decree made under the statute.

(2) Western, 133.

(3) Western, 191, 204, 205.

opinions is right, for no proof is forthcoming in this case or in any other case as to actual payments before the statute. The question is whether from facts proved to exist after the statute a customary payment before the statute should be inferred.

2. The second point is that though the clause appears to deal with customary payments in relation to places rather than individuals, yet the clause exists for the benefit of individuals who can prove such payments. Lord Eldon so holds in the passage above referred to. "If these individuals can prove, that before this statute a sum of money was raised upon each house, so long before as to have acquired the character of a customary payment, to so many houses as it can be applied to it is in law applicable; though there is no such general custom through the place or parish." It is not irrelevant to this case to notice that the proof of a general usage in the parish will assist an individual parishioner to prove his own exemption.

The question in this case is whether the defendants show that they are within the exception in cl. 18 of the decree, for I agree with the view expressed by Tomlin J. and the members of the Court of Appeal that the onus is on them. There is, however, no special privilege attached to the position of a titheowner that exacts a higher standard of proof from persons resisting his claims than in other cases. The question is whether there is evidence that reasonably satisfies the tribunal that the defendants' allegations are true. It may be conceded that the mere fact that payments have not been demanded at all on analogy to cases of claims to tithes proper does not of itself afford a defence. And proof of payments less than the full statutory sum is in itself insufficient if the sums paid are so fluctuating in amount that they cannot lead to the inference that they were paid in pursuance of an obligation to pay what was before the statute a customary payment. I doubt whether in all cases it would be necessary to prove that the customary payment was a definite fixed sum. It would appear from the authorities that the customary payment might be a fixed rate or poundage less

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than the statutory poundage. But it is for the defendants to aver and prove the customary sum upon which they rely. In the present case the defendants aver a customary payment of 19*s.* per annum, and that certain sum they have to prove. It is evident that the exemption would be of little value if it only applied to the occupiers of houses actually in existence at the date of the statute in 1545. It is now well established that houses built on the site of houses which enjoyed the statutory exception are entitled to the exception. In *Williamson* v. *Gosling* (1) the defendants had owned several old houses for which customary payments had been made, had pulled them down and built two new houses on the site. On a bill for tithes by the lay impropriator claiming the full statutory payment upon both houses, the Court decreed payment according to three of the customary payments, and decreed payment of the full amount on the ground where the house called the "Gentleman and Porter" ale-house once stood. On the latter site, it is reasonably plain, no customary payments had been applied, and the case so understood is approved by Lord Eldon in the *Warden of St. Paul's* v. *Kettle*. (2) See also the judgment of Sir William Grant M.R. in the *Antrobus* v. *East India Co.* (3)

The defendants therefore will succeed if they prove that for the premises which they now occupy, or for the premises formerly occupying the same site, a customary payment of 19*s.* per annum was payable at the date of the statute. They can, of course, only prove this by showing facts in existence since that date which lead to the inference that such payments were made before that date. There is a volume of evidence in the case adduced by the defendants, and in my opinion it leads irresistibly to the inference required by the defendants. I will proceed to deal with it in chronological order.

In 1632 there is produced a list of payments for tithe of forty-six parishioners who had paid five years' tithe in advance. It includes the name of Thomas Jennings, through whom the defendants trace occupation, who is recorded as

(1) Western, 152. (2) Western, 191, 204.
(3) Western, 210, 221.

paying a tithe of 35*s.* per annum. It may be remarked that payment of a sum five years in advance perhaps points rather to a fixed sum than a sum based on a rental which might increase in the course of five years, but the period is so short that I do not think the fact is entitled to much weight. Of more importance is the fact that of the forty-six payments recorded only five appear to be a multiple of 1*s.* 4½*d.* or 2*s.* 9*d.*, the statutory rates, and these are for sums of 11*s.*, which may equally well be a customary payment. Jennings' 35*s.* cannot be arrived at by the statutory rate or the nearest round figure to it either to a shilling or sixpence, and several of the sums are expressed in shillings and pence. Moreover, such of the names as can be traced appear continuously afterwards in the documents hereafter to be mentioned recording customary payments of exactly the same amounts. As instances I refer to Backhouse at 3*l.* a year (15*s.* a quarter) and Timothie Cruso at 30*s.* a year (7*s.* 6*d.* a quarter).

In the years 1658–1662 there is evidence of litigation by the then lay impropriator, Sir John Langham, against the parishioners of St. Helen's, to the effect of which I venture to think sufficient importance has not yet been attached. In those years it appears that Sir John Langham sought by litigation to enforce the payment of tithes against what appears to be substantially the whole of the parishioners.

In 1659 there was a decree, dated April 21, 1659, made (Record, p. 63) in a suit in the Exchequer reciting that Sir John Langham filed his bill this term twelve months against Spurstowe and the other named defendants and others for the statutory tithes, reciting that the defendants pleaded customary payments, which are set out, and directing an issue by a jury of the County of Hertford, at which some of the defendants are to insist only upon the custom set forth in their answer and directing that as to four of the defendants against whom the plaintiff did not proceed they should be dismissed without costs and without prejudice.

On December 6, 1660, the issue not having been tried, it was ordered that issue should be tried next Hilary term before

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a Kent jury. There is no further record of any further proceedings.

On February 9, 1662, a decree was made in the Exchequer by consent which recites that Sir John Langham had filed his bill in Michaelmas term in the fourteenth year (1661) of the King against Sir John Lawrence and fifty-eight named defendants "and several other defendants" for discovery of their true rents and alleged rents, and reciting that each defendant had in his answer set up payment by custom time out of mind used of the certain or customary payment of named sums, it decreed by consent that the defendants should pay to the plaintiff the several and respective sums of money according to the several rates and customary payments by them set forth so long as the plaintiff should be impropriator and the defendants should be inhabitants of their respective "houses, parts of houses, shops or warehouses." Before considering the effect of these proceedings it is desirable to mention two other documents.

On December 19, 1705, the Vestry minutes record a resolution "That the decree relating to the tithes payable by the inhabitants of this Parish, dated February 9, 1662, and the rate now settled for the tithes shall be both entered in the Book of Memorials and Bequests of this Parish, and a note of reference to the same shall be set up in the vestry."

And in a register book, dated April, 1705, there is to be found the document set out at p. 76 of the Record entitled "A Tithe book for St. Helens Parish reduced to a settlement made by a decree in the Court of Exchequer, 9th February, in the year 1662, in a cause between Sir John Langham, Plaintiff, and the Parishioners of the said parish, Defendants, as the same appears by tithe books bearing date 1653 and 1654, which were made exhibits in the said cause on behalf of the said Parishioners." The book then sets out the names of the parishioners with the amounts paid by them quarterly in 1654, and in a parallel column sets out the amounts payable for the same houses or substituted houses in 1705. In the former year there are about 98 names, in the latter about 114.

The list shows that where the houses remain the same the same amounts are recorded as payable in both years. They are for sums ranging from 6*d.* to 15*s.* per quarter, and in only two of them can I trace a sum which is a multiple of 1*s.* 4½*d.* per annum.

The list further shows that the sums which the plaintiff admitted for his lifetime and for the tenancy of the defendants to be customary payments were being paid in 1654, eight years before the decree, and were being paid in 1705, forty-three years after the decree, by persons who were successors to the defendants. It further shows that in the interval between 1654 and 1705 considerable changes had taken place in the actual houses affected. There are seven or eight cases of one house being converted into two, one case of one into four, four or five of two being converted into one, one case of four into six, another of five into two. The case with which we are concerned is one in which five houses are converted into six, one of the five being the house of Thomas Jennings referred to above as having paid five years in advance in 1632 at 35*s.*, i.e., 8*s.* 9*d.* a quarter. He is recorded in 1654 as paying the same sum of 8*s.* 9*d.* a quarter.

In every case where there has been a change in the nature of the houses the same payment is recorded as due for the new houses as for the old, for which they are substituted. Thus the first entry is of—

Four houses paying.		Now six houses paying.	
s.	d.	s.	d.
8	6	2	6
15	0	2	6
1	0	3	4
6	8	3	4
		15	0
		4	6
31	2	31	2

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One house at 4*s.* 3*d.* is now two houses, each paying 2*s.* 1½*d.* Two houses paying 2*s.* and 3*s.* are now one house paying 5*s.* In the case of the group of houses of which Jennings' was one the figures are :—

	Five houses paying. s. d.		Now six houses. s. d.
Halsey ..	4 0	Stert ..	4 6
Thorney ..	2 0	Somaster ..	2 0
Wild ..	2 0	Deane	2 0
Jennings ..	8 9	Crew	3 6
Mandevill ..	3 9	Henry Durley ..	4 9
		Boteler	3 9
	20 6		20 6

Durley, who pays 4*s.* 9*d.* a quarter, i.e., 19*s.* a year, is the predecessor in occupancy of the defendants. It appears to me that this list affords evidence that Durley was recorded as paying a fixed sum of 4*s.* 9*d.* as a customary rate : an apportioned sum of a larger customary rate paid by the occupiers of a group of five houses on part of the site of which Durley's house is built. That this was the legal consequence of building on the site of a formerly excepted house I have shown is established by authority. How the apportionment was made we do not know in this case, or in the other apportioned cases which appear in the list. It happens that if you compare the six new houses with the five old : Three (2*s.*, 2*s.* and 3*s.* 9*d.*) pay the same, while two (4*s.* and 8*s.* 9*d.*) (Jennings) become 4*s.* 6*d.*, 3*s.* 6*d.* and 4*s.* 9*d.* (Durley). Why they are so divided seems to me, with respect, to be quite irrelevant when it is found that the titheowner in fact was paid and received the sum of 4*s.* 9*d.*, for it is admitted that such sum was paid from 1705 to 1714.

Either Durley was entitled to pay only 19*s.* per annum or he was bound to pay 2*s.* 9*d.* in the pound on his rent. The fact that the titheowner accepted 19*s.* seems to me to be

conclusive that he accepted the position that Durley was not bound to pay 2*s.* 9*d.* in the pound and that there was only a customary sum due. 19*s.* does not represent 2*s.* 9*d.* or 1*s.* 4½*d.* or any multiple of 1*l.* or 10*s.* The nearest approximate rent would be about 7*l.*; and if there were any doubt that the rent of this house in St. Helen's in 1705 would be more than that, it is fortunately conclusively dispelled by the evidence of assessments to land tax which will be considered later.

It appears to me that the reasonable conclusion to be drawn from the above facts so far is that the titheowner, who himself owned an important property in the parish—Crosby Square—knew of his rights under the statute, sought to enforce them by proceedings which included apparently nearly every member of this parish, failed to recover the statutory rate, was content to agree to the customary rates during his lifetime, and that the whole matter was put to rest on this footing, and, indeed, never disturbed at all until 1834, when for thirty-six years a sum of 2*l.* was paid.

But the evidence of this claim to pay only a fixed sum of 19*s.* acquiesced in by the titheowner becomes still stronger as time progresses.

On December 16, 1714, the Vestry resolved: "That the modes or accounts of Tythes payable quarterly to the Impropriator by the inhabitants of this parish be transcribed and hung up in the Vestry, that the said inhabitants at any time may have recourse unto."

Accordingly a schedule entitled "A rentale of the tithes in St. Hellens Parish, London, 16th December, 1714," was prepared and the original is produced. It has a note at the bottom: "This engrossment agrees as to the rates with the rentale entered in the old Register Book among the records of the Parish," which is the list in double columns for 1654 and 1705 which I have described. The items number about 112. In the interval between 1705 and 1714 many of the occupiers have changed, amongst them, Henry Durley has been succeeded by Jane Bowie, but she is recorded as being due to pay 4*s.* 9*d.* a quarter just as Durley did. Several

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names are the same as in the list of 1705, and the amounts are the same. The list shows small sums payable quarterly, a very small proportion being multiples of 1*s.* 4½*d.* or 2*s.* 9*d.* It appears to me that the only explanation of this list is that it purports to show fixed customary payments as due from the parishioners. If they were bound to pay at the statutory rate on a rental, what conceivable use would it be to the parishioners to know what their predecessors paid in 1705 or they themselves were paying in 1714? The amount would then depend on the rent for the time being. But if there were fixed payments it would be a great convenience to have a public record "that the inhabitants at any time might have recourse thereto."

There is no direct evidence of the precise sum, if any, paid between 1714 and 1795. In the absence of such evidence, in view of the failure of the titheowner in the previous century to recover the statutory rate, and of the parish records above referred to, I should have drawn the inference that any sum paid did not exceed the sum expressed in the published parish schedule. But I think that there is the strongest evidence that those sums were in fact paid. In November, 1795, the tithes were sold, and in October, 1795, no doubt in view of the sale, a Vestry minute of October 8 records a resolution "That one hundred copies of the Table of the Tythes payable by the inhabitants of this parish be printed and distributed amongst such inhabitants." Accordingly 100 copies were printed, one of which is reproduced in the Record. It is noteworthy that the resolution treats the table of tithes of 1714 as being a table of tithes payable by the inhabitants, by which I think is meant payable in 1795 as well as in 1714, and the only object of reprinting a list of the names of occupiers at the earlier date with the sums payable by them can be to enable their successors to know the precise sums payable now by them. In other words, it is only consistent with a certain sum being payable annually, and not with a sum varying with the rental. On November 12, 1795, the tithes were sold. We have the particulars of sale: "Particulars of the Freehold Tythes of

St. Helen's, Bishopsgate Street, producing 64*l.* 10*s.* 6*d.* per annum." "The tythes are freehold and produce 64*l.* 10*s.* 6*d.* per annum, out of which is paid to the rector per annum, 20*l.*; land tax, 4*l.* Nett income, 40*l.* 10*s.* 6*d.*"

Now the parish record published in the vestry in 1714 and reprinted just before the sale in 1795, shows an annual total of about 64*l.* 12*s.* 6*d.* Can there be any doubt that the vendor was representing that he was actually receiving in gross income the amount of the scheduled payments and out of them paying the rector 20*l.* and land tax 4*l.*, and was enjoying a nett income of 40*l.* 10*s.* 6*d.*? I infer therefore that between 1714 and 1795 the inhabitants were actually paying the customary sums and were paying no more. If any statutory payments were being asked for or made, it is to my mind impossible that such would not have been stated by the vendor. It seems to me, therefore, that we have convincing proof that in the period before 1795, as admittedly in the period 1705 to 1714, the defendants' predecessors in this house were paying the same fixed sum of 19*s.* per annum, and were not paying a rate on the rental.

We now come to the evidence afforded by the land tax assessments. In 1705 Durley who, as we know, was recorded as liable to pay and did in fact pay 19*s.* for tithes was assessed to land tax for 11*l.* In 1714 Jane Bowie who succeeded Durley and is recorded as having to pay 19*s.* for tithe is assessed at 5*l.* 10*s.*; Thomas and Abraham Gooding being bracketed with him as being assessed at 6*l.* for personal estate. In 1793 John Page, who is now the occupier, is assessed for land tax at 8*l.* 15*s.*, and his rental valuation is given as 50*l.* We know from a deed of release of November 1, 1793, that this was the true rental, for Page was occupying under a lease for twenty-one years from Christmas, 1789, at 50*l.* per annum. It is well known that the assessments for land tax were low, but it is known that the amounts never exceeded 4*s.* in the pound. In 1746 they were reported not to exceed 3*s.* in the pound in London on the true value: see pamphlet quoted in Bourdin on Land Tax, 4th ed., p. 15. It is reasonably certain therefore that if one finds in 1705

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and 1714 an actual levy of 11*l.* or 5*l.* 10*s.* for the year it must be based upon a rental far in excess of those sums, and therefore far more than the 7*l.* which would realize 19*s.* at the statutory rate. But the matter is made clear in 1793 when we know that the rent and the land tax valuation is 50*l.*, and the payment for land tax is 8*l.* 15*s.*, which is 3*s.* 6*d.* in the pound. If the titheowner had been collecting the tithes on the statutory basis he would have been entitled to 6*l.* 17*s.* from Page alone ; more than 10 per cent. of the whole income which he derived from tithe. It seems to me incredible that in these circumstances he would have sold on the footing of a gross income of 64*l.* 10*s.* 6*d.*, if from one occupier alone he had a right to collect a further 6*l.* per annum. The only explanation can be that both parties knew that the amounts exigible in law were the fixed payments recorded in the parish schedule. The facts above stated as to land tax assessments, and the rental fixed by law in 1789, seem to show that Tomlin J. understated the defendants' case when he held that there was nothing against which he could measure the rate of the annual payments actually proved.

I must now deal with a point which arises upon the printed copy in 1795 of the list of tithes of 1714. In the print Jane Bowie the occupier of the house in question in 1714 is printed as paying 4*s.* per quarter and not 4*s.* 9*d.* After 1795 and up to 1807, Page the then occupier of the premises paid at the rate of 16*s.* per annum to the new titheowner. This fact is strongly relied upon by the plaintiffs as showing a deviation from the alleged fixed sum of 19*s.* and as being destructive of the continuous chain of proof on which the defendants seek to rely. My Lords, the facts appear to me to afford the strongest support to the defendants' case. I think that the only inference that can be drawn is that the difference between the print and the original is due to a misprint. The resolution of the Vestry which resulted in the print was that "Copies of the table should be printed and published." The print itself by a note on it states "This is a copy of the engrossment hanging in the vestry," and is signed by the two churchwardens. It does not purport to be a statement

of the names and amounts as of 1795 but of 1714, eighty-one years before. What possible reason could anybody have for altering the amount which had appeared in the engrossment of 1714 against Jane Bowie's name 4*s.* 9*d.*, and which we know corresponded with the amount appearing in the double column list of April, 1705, into an amount of 4*s.* as paid by her in 1714? The idea of some deliberate change seems to me to be fantastic. It is reasonably plain that the print is made from a copy of the engrossment; there is some slight correction of methods of spelling. There is one other instance of a mistake where Phillip Sandford 3*s.* is printed Philip Sandford 3*s.* 3*d.* Every other sum of money is identical. The mistakes are precisely what might be expected in copying a list of some 112 items, and as deliberate alterations they are unintelligible and contradict the known object of the document and its own express purport. I have not the least doubt myself that the difference is due to a mistake. But two important facts emerge. The first is that till 1805 Page paid and the titheowner received the 16*s.* The only explanation of this, as it appears to me, is that they paid and received on the footing that the printed copy purporting to be a copy of the engrossment represented the true legal relation, a fixed sum, and not a rate on the rental. No other explanation of a payment of 16*s.* can be suggested. Mr. Page's rental, as we know, was 50*l.* The second important point is that when the payment of 16*s.* ceased, the occupier reverted to what? A rental rate? no; but the original fixed rate of 19*s.* This fact seems to me to be of the greatest significance, for in 1805 the tithes were sold to the Rev. Ed. Cooke, who we are told boasted that he knew the law of tithes as well as any Chief Baron of the Exchequer, and had set to work successfully to raise the tithe rental. But when he sold, as he did in 1822, the conditions of sale represent the then occupier of the premises in question, Mr. Tottie, as still paying 19*s.* This seems to me to afford the strongest corroboration of the view that the payment of 16*s.* was a mistake and not deliberate, and that the Rev. Mr. Cooke, a second Sir John Langham so far as his will to exact the

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limit from the tithepayer was concerned, was impelled to accept the position that 19*s.* was the fixed sum actually due.

The conditions of sale of 1822 are themselves significant. The sale is of the rectory and freehold tithes of the parish of St. Helen's payable for the whole of Crosby Square, the East India Company's St. Helen's Warehouses, St. Helen's Place, and for several houses on part of the East and West sides of Bishopsgate, now producing the annual sum of 404*l.* 6*s.* 6*d.* The conditions state: "The tythes being payable under the Statute of Henry VIII., which allows the impropriator to claim to the extent of 2*s.* 9*d.* in the pound on the Rack Rents of the houses, etc., the tythes, which are not customary payments, will be capable of very considerable increase." The particulars then proceed to give a list of thirty-three houses in St. Helen's Place and Crosby Square amounting to 355*l.* 11*s.*, and then give a list of further premises and payments under the heading: "The following are claimed to be customary payments amounting to about 50*l.* per annum but are not all admitted to be such by the vendor." Then follows a list of houses in fifty-four items amounting to 48*l.* 15*s.* 6*d.* and a note that "The tythes of such houses and warehouses in the Parish, as are not included in this Particular, are vested in the owners of the respective Premises." In the list making up 48*l.* 15*s.* 6*d.*, Mr. Tottie is recorded as paying the now familiar 19*s.* and the remainder of such list conforms to the printed list and parish records so often referred to. It is significant (*a*) That the reverend and learned vendor admits that there are some customary payments; (*b*) that the sale is of the whole of the tithes of the parish now in existence, and that he has not succeeded in recovering any payments other than the alleged customary payments except for houses in St. Helen's Place and Crosby Square. The reason for the exception is not without interest. The houses in Crosby Square were built upon the land owned by the former impropriator, in respect of which no tithe customary or otherwise had been paid. The houses in St. Helen's Place were recently built upon the site of the old Leathersellers Hall (see Brayley and Britton's Beauties of

England and Wales, vol. x., Part III., London, Middlesex, by the Rev. J. Nightingale (1815), p. 167), which had been exempt from tithe by the exemption in cl. 16 of the decree of 1545, and such houses therefore had no claim to the benefit of customary tithe.

Having now brought the history of the tithe in relation to the premises in question down to 1822, and having shown a continuous record in public and other documents of a proved customary payment of 19*s.* from a period before 1705 up to 1822, it becomes possible to deal shortly with the subsequent period. From 1822 to 1834, though there appear to be accounts of the tithe collectors in existence, there is no entry of a payment in respect of this house. From 1834 to 1871 a sum of 2*l.* was paid not by the occupier but by the owner, and the entry is that: "This is a composition with Chapman." Who Chapman was does not appear. What we do know is that in 1837 the premises were assessed to Poor Rate at a valuation of 70*l.* per annum, and in 1870 at 140*l.* Thus in 1837 the statutory rate at 2*s.* 9*d.* would be 9*l.* 12*s.* 6*d.*, and in 1870, 19*l.* 5*s.* per annum. After 1870 payments were made to a trustee for the owner of the property by his cestuis que trustent representing interest on the purchase price of the tithes which had been bought by the trustee apparently for his own account. The payments are called tithes but are obviously not, and apparently have nothing to do with the occupiers. As far as one can see no occupier has in fact made a payment for tithe since 1822. I can draw no inference from the payment of 2*l.* instead of 19*s.* for the thirty-seven years from 1834–1871 which impairs the effect of the continuous payments of 19*s.* for over a century before. It is probably sufficient to say that 2*l.* is so little more than 19*s.* and so much less than the statutory rate, as to support the defendants' view rather than the plaintiffs'. It certainly is not an admission that no customary tithe was payable.

What then is the legal conclusion from the facts above stated? My Lords, I should have thought that if there was one legal doctrine more firmly established than another it

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is that from long continued user of a right you are to infer a legal origin if possible. It is a doctrine upon which numerous titles depend. It is indeed the doctrine upon which the plaintiffs' right in this action probably depends, for it has been a moot question whether the decree annexed to the Act of 1545 was ever enrolled, as was required by the statute. The point was not finally settled till the decision of the House of Lords in *Macdougall* v. *Purrier*. (1) Lord Eldon said: "What are we to say to the fact, that in the memory of all living men the citizens of London have paid tithes under this Act? Are the citizens of London so fond of paying tithes and so liberal as not to take advantage of their non-liability? Do they differ from all other persons in that respect? The fact of payment for two or three centuries is enough to justify your Lordships in presuming an enrolment, though it cannot now be produced. Many cases have occurred, and in some of them I have been professionally engaged, in which the rights of the clergy under this Act have been the subject of discussion, and yet this objection to the non-production of the enrolment has never before been taken, judges and counsel being equally satisfied, from the long train of decisions, and from long existing usage, that the Courts must at the end of two or three centuries act upon the presumption that all things, which the Act rendered necessary to be done, had been rightly done at the time. If your Lordships were not to act upon such a presumption, you would shake the foundations of every title to property in the kingdom."

I will refer to one other well known authority, the decision in *Shephard* v. *Payne* (2) in the Exchequer Chamber. It was an action to recover fees alleged to have been improperly demanded by the defendants as registrars of the Archdeaconry Court of Colchester for attending the Archdeacon's visitation. The decision was given on a special case in which the question was whether the fees were legally payable and recoverable in amount. The Court had power to draw inferences of fact.

(1) (1830) 2 Dow & Cl. 135, 165. (2) 16 C. B. (N. S.) 132, 135.

Blackburn J., delivering the judgment of the Court, said: "The facts stated in the case show, that, from 1727 to 1801, visitation fees of the unvarying amount of 7*s.* 6*d.* and 4*s.* 6*d.* were uniformly received. From 1801 to 1857 (when the present dispute originated), fees of a varying amount, but always slightly in excess of 7*s.* 6*d.* and 4*s.* 6*d.* were received. The amount in excess of 7*s.* 6*d.* and 4*s.* 6*d.* is not now claimed; and, if it were, the uniform receipt for seventy-one years (from 1727 to 1801) [*sic*] of the amounts of 7*s.* 6*d.* and 4*s.* 6*d.* would be overwhelming evidence that the excess was a usurpation. But the modern usurpation of an excess does not affect the title to the original fees of 7*s.* 6*d.* and 4*s.* 6*d.* These have been received from 1801 to 1857 as much as from 1727 to 1801: so that the title to them depends on an unbroken perception as of right for one hundred and thirty years. That does not in itself give any title: but, in favour of vested interests, and for the quieting of titles, the rule of evidence has been established, that, where there has been long-continued modern user of a right capable of a legal origin, the existence of that legal origin should be presumed, unless the contrary be proved. This presumption is not one juris et de jure, which cannot be rebutted; but neither is it one purely of fact, and only to be drawn when the jury really entertain the opinion that in fact the legal origin existed."

My Lords, the rule of evidence referred to cannot be confined to cases where the person setting up the right is seeking to enforce it in the litigation. It must be equally applicable where the defendant being sued on an alleged right of the plaintiff is setting up a right on his part to make a reduced or a different payment. In both cases the question for the decision is what is the legal right, and the rule is a rule of evidence to determine that question. I can hardly doubt that if the plaintiffs here were claiming only a customary payment of 19*s.* and adduced the evidence given in this case, they would have established their case. *Shephard* v. *Payne* (1) seems conclusively to fit the facts of this very case,

(1) 16 C. B. (N. S.) 132.

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and in my opinion the same inference should be drawn in favour of the defendants.

There is, I think, authority for drawing the inference required by the defendants in cases involving the right to London tithes. In *Warden of St. Paul's* v. *Morris* (1) Lord Eldon said: "I admit, that where it is clear, that something, not 2*s.* 9*d.* in the pound, has been paid, you are to endeavour to apply it, so as to fix the accustomed payment." As in that case the evidence was that there had been records of rates in 1672, 1676 and 1681 which varied, and a jury had decided against a customary payment; it is not surprising that Lord Eldon refused a new trial on the ground that evidence of a former decree had been rejected, which in his view would throw no new light on the matter. So in *Warden of St. Paul's* v. *Kettle* (2): "Whatever may be the probability that 2*s.* 9*d.* in the pound never was paid in this parish [St. Gregory] . . . . yet I cannot regard that fact as more than negative evidence, strong negative evidence, if connected with material positive evidence, that there must have been some other payment due from the parishioners." He goes on to say that the onus is on the parishioners to show what that customary payment is. But he refused a new trial, as he says: "After two trials at bar, when it was admitted, that through centuries there has been no customary payment, and no man has been able to say what it was."

I think that the observations of Lord Eldon indicate that if he had such evidence of a customary payment as is given in this case he would have found the customary payments proved. There is one further authority which appears to me to be of great weight: the decision of Lord Wrenbury, then Buckley J., in *Foster* v. *Plumbers' Co.*, in January, 1900, which is set out in the Record. It is a case on this very title to the tithes in this parish. The learned judge found that the customary payment had been established. I have looked carefully at the judgment and I cannot see that the learned judge had any evidence of actual payment of the alleged customary 16*s.* other than some of the very documents

(1) Western, 169, 184. (2) Western, 191, 205, 209.

in this case except that Nottingham was a party to the suit of *Langham* v. *Lawrence*, where he set up a customary payment of 1*s.* 8*d.*, which the judge traced into the 16*s.* in question. The learned judge (Record, p. 114), after discussing *Lee Conservancy Board* v. *Button* (1), where the Court of Appeal had refused to presume one legal origin where another was possible, says: "I do not think that applies at all to a case, where, as here, you have got to choose between the liability to 2*s.* 9*d.* in the £ or a liability to the 16*s.* There might have been a perfectly good legal origin for 16*s.* It may have been a customary payment. You have not got to presume anything as regards that. It is simply a question of fact to be investigated whether the facts given in evidence lead the mind to the conclusion that the 16*s.* having been paid for so many years must have been paid and received because it was the sum payable, and, if so, you are entitled to carry that back to the earlier date, and say that you are satisfied that that was so before the statute was passed. Now the evidence does satisfy my mind that these payments which have been received during so many years are the proper payments, and that the 16*s.* is the sum payable." My Lords, I entirely agree with that train of reasoning, and it appears to me that from before 1705 to 1822 19*s.* was paid and received, because it was the sum payable. Applying Lord Eldon's test, I would ask, are lay impropriators in the City of London so fond of remitting tithes and so liberal as not to take advantage of their rights?

In this particular case we have two known owners, Sir John Langham and Mr. Cooke at intervals of 150 years, both obviously prepared to exercise their rights to the full. The one has to admit customary rights in at least half the parish, and never appears to have collected the statutory rate at all. The other finding a payment by mistake of 16*s.* restores the payment to 19*s.*, where the statutory rate would, as we know, produce at least 6*l.* 17*s.* Finding then that 19*s.* was paid and received because it was the sum payable, I necessarily conclude that it was a customary payment. And, if so,

(1) (1879) 12 Ch. D. 383.

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Jennings' payment of 35*s.* must equally certainly have been a customary payment; and so of each occupier back to a period before the statute of 1545.

In my opinion, therefore, my Lords, the defendants have established their defence, and I agree with the unanimous decision of the Court of Appeal. The contrary conclusion leads to the remarkable position that for the first time in 350 years the titheowner will receive the statutory rate. Fortunately it will also be the last, for the tithe has now been commuted under the Act of 1871.

In my judgment the titheowner has no legal right to the good fortune that has befallen him, and I would dismiss this appeal with costs.

Order of the Court of Appeal reversed and judgment of Tomlin J. restored. The respondents to pay the costs in the Court of Appeal and also the costs of the appeal to this House. Cause remitted back to the Chancery Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, May 11, 1928.

Solicitors for the appellants: *Peacock & Goddard.*
Solicitors for the respondents: *Waterhouse & Co.*

[PRIVY COUNCIL.]

BANKING SERVICE CORPORATION, LIMITED . . . . . } APPELLANTS;

AND

TORONTO FINANCE CORPORATION, LIMITED, AND ANOTHER . . . . } RESPONDENTS.

J. C.*
1928
March 12.

ON APPEAL FROM THE SUPREME COURT OF ONTARIO, APPELLATE DIVISION.

Canada (Ontario)—Company—Issue of Shares as fully paid—Consideration—Construction of Agreements—Services to be rendered—Procuring Subscription to Shares—Ultra Vires—Ontario Companies Act (R. S. Ont., 1914, c. 178), s. 100, sub-s. 2.

The appellant company, having promoted the incorporation of the respondent company by letters patent under the Ontario Companies Act, made to it a proposal in writing which was accepted. Two agreements were then entered into each of which referred to the written proposal. The first agreement provided that the appellant company should instal with the respondent company its own system of business, providing office room and clerical assistance, and should enter into a separate agreement to underwrite the whole of the respondent company's preferred shares at an agreed commission, and that the consideration payable to the appellant company for the foregoing should be the issue to it of 99,983 of the common shares as fully paid. The second agreement provided for the underwriting of the preferred shares. The fully paid common shares were allotted to the appellant company as agreed:—

Held, that, having regard to the terms of the agreements and written proposal, the two agreements constituted a single transaction, and that the allotment was ultra vires under the Ontario Companies Act, s. 100, sub-s. 2—which is in the same terms as the (English) Companies (Consolidation) Act, 1908, s. 89, sub-s. 2— in that it was in consideration of an agreement to subscribe, or to procure subscription to, shares.

Judgment of the Supreme Court of Ontario (59 Ont. L. R. 278) affirmed.

APPEAL (No. 101 of 1927) from a judgment of the Appellate Division of the Supreme Court of Ontario (June 29, 1926) affirming a judgment of a judge of that Court.

The respondent company brought an action against the appellant company in the Supreme Court claiming that the

* *Present:* LORD BUCKMASTER, LORD SHAW, LORD WRENBURY, LORD BLANESBURGH, and LORD ATKIN.

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issue and allotment to the appellant company of 99,983 common shares of $10 each in the respondent company was ultra vires and invalid, and for consequent relief. The second respondent, A. E. Cook, was joined later as a plaintiff sueing on behalf of himself and all other shareholders in the respondent company.

The facts material to the decision of the Judicial Committee appear from their Lordships' judgment.

The trial judge (Rose J.), by a judgment reported at 57 Ont. L. R. 514, held that the allotment was ultra vires, on the ground that the services which the appellant company agreed to render to the respondent company were of far less value than the nominal value of the shares, and that consequently they had been issued at a discount.

The Appellate Division, in a judgment reported at 59 Ont. L. R. 278, affirmed the judgment. The learned judges agreed with the view of the learned trial judge, and the majority expressed the further opinion that the allotment was invalid under the Ontario Companies Act, s. 100, sub-s. 2, the material terms of which appear in the present judgment.

1928. March 12. *Tilley K.C.*, *W. A. Greene K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellants.

Wegenast and *J. B. Lindon* for the respondent company.

C. C. Robinson K.C. and *T. Moss* for the respondent Cook.

The judgment of their Lordships was delivered by

LORD BUCKMASTER. Their Lordships do not think it is necessary to call upon the respondents in this case, for, having heard the matter fully argued, they are of opinion that the appeal must fail.

The appellants are a company which organizes building mortgage and discount corporations and provides them with capital. In the course of their operations they promoted the respondent company. This latter company was incorporated on February 3, 1921, with a capital of $2,000,000, divided equally into preference and deferred shares, both the preference and the deferred shares having

a face value of $10 apiece. In order to make the respondent company effective as a business concern, the appellants considered that the system with which they were acquainted would need to be installed, and at the same time that they could raise the capital necessary for the purpose of carrying on the business, which in the main, consisted in financing the erection, purchases and sales of houses in selected spots. Accordingly, a proposition was prepared by the appellants and placed before the respondents which contained two proposals, first, that the appellant company should start the business of the respondent company, and secondly, that they should provide the necessary capital for carrying on its work. This capital was to be provided by the issue of the preference shares, for it was not contemplated that the ordinary shares should be employed for the purpose, except so far as they might be used as bonus shares to induce either purchasers or applicants for the preference stock.

Although the two proposals are in their nature independent, their Lordships are of opinion that the proposition itself which was placed before the respondent company was a proposition in which both the two branches were closely associated, and that there were not, and there were never intended to be, two separate and independent proposals. This is shown in the terms of the proposal itself which contains the following sentence: " moreover we are satisfied that very substantial profits can be earned for the subscribers of your company if our system and ideas are adopted by your corporation, provided, of course, that sufficient working capital is raised; and which we are also willing to obligate ourselves to obtain with your assistance "; the proposal continues by stating that the appellants are prepared to instal the system and to attend to every detail in connection with the obtaining of the necessary working capital, the consideration for installing the system and for the experience and ideas " in connection with the services which we propose to furnish the company " will be the issue of 99,983 shares. The proposal then refers to the means of raising capital and provides that the appellants shall be entitled to a commission

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on all the capital for which they obtain subscriptions. The proposition in that form is put before the directors of the respondent company, who consider and adopt it, and this adoption was confirmed by the shareholders. It was, however, contemplated from the first that a further agreement or agreements had to be prepared, as is shown from this statement at the foot of the original proposition : " Obviously all of these details will have to be worked out and incorporated in one or more agreements, and if the terms of our proposition are accepted by your board we will draft the agreements in question or you can have your solicitors do so and submit them to us."

Pursuant to that proposal and acceptance, agreements were, in fact, prepared. They were two. The first is one which refers to the proposition in writing, that has been accepted, and states in the first recital the arrangements for providing the necessary experience and the assistance for establishing the business, and in the second recital the agreement for providing the working capital by underwriting or sale of the company's preferred shares. After those two recitals, which are both accurate recitals of the two branches of the original proposition, the operative part of the agreement begins. In its first clause it provides that the appellants shall instal its business system, provide the necessary office place, and do the necessary clerical work, and in the second, the appellant company agree to enter into a separate agreement compelling it to underwrite or sell all of the preferred shares of the company at the original agreed commission. Following on these two recitals and the carrying out of these two provisions about the business and the issuing of the shares, para. 3 of the agreement is in these words : " The consideration payable by the second party to the first party for the foregoing is hereby fixed at 99,983 shares of the common stock of the second party, to be issued to the first party as fully paid and non-assessable, upon the first party executing this agreement and the further agreement with reference to the obtaining of the second party's working capital hereinbefore referred to."

A second agreement was then prepared. That agreement, it appears to their Lordships, was in point of time executed, subsequently to the first, because it recites the proposition in writing, that the proposition has been accepted, and the agreement to underwrite or sell the preferred stock. It also recites that " by agreement bearing even date herewith entered into between the parties hereto, the first party has agreed to take over and have installed . . . . the business system " ; and then refers to the proposed reduction into writing of the terms relating to the underwriting or sale of the preferred stock, which it proceeds to effect. On the face of these agreements, therefore, it appears that there had been as consideration for the dual obligation cast upon the appellants, the duty cast upon the respondents of issuing 99,983 shares of the common stock as fully paid.

That brings at once into consideration the provisions of the Ontario Companies Act, R. S. Ont., 1914, which, by s. 100, appears to prohibit this very transaction. Sect. 100 provides by sub-s. 1 that upon any offer of shares to the public, the company may pay commission subject to two conditions : the one is that the rate of commission is authorized by the letters patent ; and secondly, that it does not exceed the amount or rate disclosed by the letters patent and by the prospectus. Nothing turns upon that ; but sub-s. 2—which is taken in terms from the English Companies (Consolidation) Act, 1908—states that except as therein provided by sub-s. 1, " no company shall apply any of its shares or capital either directly, or indirectly, in payment of any commission, discount or allowance to any person in consideration of his subscribing or agreeing to subscribe, whether absolutely or conditionally, for any shares of the company or procuring or agreeing to procure subscriptions, whether absolute or conditional, for any such shares, whether the shares or capital be so applied by being added to the purchase money of any property acquired by the company or to the contract price of any work to be executed for the company or be paid out of the nominal purchase money or contract price or otherwise."

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Unless it is possible therefore to make the issue of the shares the exclusive consideration for rendering the services apart from the issue of the capital, it cannot be denied that the transaction entered into is in direct defiance of the provisions of the Act of Parliament; but it has been argued on behalf of the appellants that the matter ought to be regarded as though two totally distinct and independent bargains had been made, the one being the arrangement for underwriting or selling the preference shares, on agreed terms as to commission, and the other, the agreement for the rendering of the services the value of which, it is assumed, were measured or fixed at 99,983 shares.

If it had been possible to establish such a contention, further questions might very well have arisen, but in their Lordships' opinion, it has been impossible to get so far. The original proposition, although it contained two matters which, in their nature, were distinct, was one offer accepted as one offer by the company, and it would have been quite impossible for the company to have accepted one branch of the offer and then said, "That is all we mean to do," because it is plain that the appellant company would then have been quite unable to have carried out successfully the operation which, for its ultimate efficiency, depended upon their being able to get control of the ordinary shares in order that they might obtain the necessary inducement to persuade purchasers to accept the preference shares. The proposition was one proposition with two heads. It might have been possible, as no agreement was entered into, that even after the original proposal the two heads could have been separated, and two independent agreements might have been prepared, one of which would have fixed the value of the services at the agreed figure of the shares and the other would have fixed the price for the underwriting at the agreed commission, but that is not, in fact, what was done. The first agreement was executed, reciting both the obligations that the appellant company was prepared to undertake, stating in plain language that the consideration payable "for the foregoing"—that was for both obligations which they were called upon to carry out—

was 99,983 shares; and it appears to their Lordships quite useless to consider whether the same transaction might not have been carried out within the limits of the law by other means. The means that were, in fact, adopted are, in their opinion, in contravention of s. 100, sub-s. 2, of the Ontario Companies Act, and therefore were ultra vires the company.

There were other questions that were raised before the trial judge and before the Appellate Division. Having regard to their Lordships' opinion upon this first point, they have not thought it necessary to hear arguments of counsel for the appellants upon them, since they could only arise if the appellants could succeed in overthrowing the case against them which the terms of the section and the terms of the contract established. This, in their Lordships' opinion, they have completely failed to do.

Their Lordships think, therefore, that the judgment of the Appellate Division was right, and that this appeal should be dismissed with costs to the respondent company, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Freshfields, Leese, & Munns.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1928 May 17.

DOMINION PRESS, LIMITED . . . . APPELLANTS;

AND

MINISTER OF CUSTOMS AND EXCISE RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada—Taxation—Tax on Sales by Producer—Printed Matter to Order—Special War Revenue Acts—12 & 13 *Geo.* 5, *c.* 47, *s.* 13 (*Dom.*)—13 & 14 *Geo.* 5, *c.* 70, *s.* 6 (*Dom.*).

The appellants supplied at an agreed price printed bill heads and other commercial stationery to the order, and to suit the individual requirements, of individual customers; no privity of contract existed between the supplier of the paper used and the customer:—

Held, that the above transactions were sales by a producer within the meaning of the Dominion taxing enactments 12 & 13 Geo. 5, c. 47, s. 13, and 13 & 14 Geo. 5, c. 70, s. 60, as appeared from the language of an exemption in favour of job-printers doing a limited business, and from the general scope of the legislation; further, that an exemption in favour of certain retailers was validly limited to sales made under regulations by the Minister of Customs and Excise.

Judgment of the Supreme Court of Canada [1927] S. C. R. 583 affirmed.

APPEAL (No. 141 of 1927) by special leave from a judgment of the Supreme Court of Canada (June 17, 1927), reversing a judgment of the Superior Court of Quebec (January 7, 1927).

The respondent brought an action against the appellants in the Superior Court of Quebec claiming $3684 arrears of tax for the period from April, 1923, to October, 1924, under Special War Revenue Act, 1915, s. 19 B B B, of the Dominion, as amended by the statutes for 1922, c. 47, s. 13, and the statutes for 1923, c. 70, s. 6.

The question in the litigation was whether the appellants were liable upon the true construction of the enactments having regard to the nature of their transactions.

The facts and the terms of the material statutory provisions appear from the judgment of the Judicial Committee.

The trial judge (Duclos J.) held that the appellants were not liable. An appeal, which by consent was taken direct

* *Present:* LORD HAILSHAM L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

to the Supreme Court of Canada, was unanimously allowed. The judgment of that Court, delivered by Rinfret J., is reported at [1927] S. C. R. 583.

1928. May 15, 17. *Pritt K.C.* and *Langedoc K.C.* for the appellants.

Macmillan K.C. and *T. Mathew* for the respondent.

May 17. The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. In their Lordships' opinion this appeal fails.

The question to be determined turns upon the construction to be placed upon two taxing statutes, one passed in 1922, which covers the period down to January 1, 1924, and the second passed in 1923, which covers the period after January 1, 1924.

The appellants, the Dominion Press, Ld., are a company carrying on business in the Province of Quebec, in the Dominion of Canada, as printers. According to the evidence, they do not stock goods available for purchase by any customer who comes to their place of business. Their business consists in printing to the order of individual customers stationery of a business character, the customer explaining exactly what goods he desires and the printer furnishing the goods at a fixed price; the relationship between the printer and the customer is that of principals, and no privity of contract is created between any supplier of paper, on the one hand, and the customer on the other.

The appellants contend that in these circumstances they do not come within the words of the taxing statute. The Act of 1922 imposes a tax of $2\frac{1}{4}$ per cent. "on sales and deliveries by Canadian manufacturers or producers and wholesalers or jobbers," and it contains two provisos. First of all, there is a proviso which enacts that "the tax shall not apply to sales or importations of job-printed matter produced and sold by printers or firms whose sales of job printing do not exceed 10,000 dollars per annum." Secondly, there is a proviso that the taxes "shall not be payable on goods

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exported or on sales of goods made to the order of each individual customer by a business which sells exclusively by retail under regulations by the Minister of Customs and Excise, who shall be sole judge as to the classification of the business."

The Act of 1923 imposes a tax of 6 per cent. " on the sale price of all goods produced or manufactured in Canada "; and it does not reproduce the provisos.

The first question to be determined is obviously whether or not these transactions are sales and deliveries by Canadian manufacturers or producers within the enacting words of this section. In their Lordships' opinion they do come within that language.

There has been a discussion before the Board as to whether or not the contract was a contract of sale and delivery within such cases as *Lee* v. *Griffin* (1), or a contract for work and labour done and materials supplied within the authority of *Clay* v. *Yates*. (2)

In their Lordships' opinion the material matter to be considered is as to the meaning of the expression " sales and deliveries by Canadian manufacturers or producers " as used in this statute.

Having regard to the language of the first proviso and to the general scope of the enactment, their Lordships entertain no doubt that these contracts were contracts of sales and deliveries by Canadian manufacturers or producers, within the meaning of the taxing statute, and that the payments made under them constituted the sale price of goods produced or manufactured in Canada. That would be enough to dispose of the appeal with regard to the period after January, 1924.

With regard to the earlier period, a further argument was adduced before the Board that the second proviso exempted the appellants from liability. It was said that these sales, if they were sales, were sales of goods made to the order of each individual customer by a business which sells exclusively by retail, and it was contended that, if that was the case, it necessarily followed that the transactions were exempt and

(1) (1861) 1 B. & S. 272. (2) (1856) 1 H. & N. 73.

that the succeeding words in the proviso, "under regulations by the Minister of Customs and Excise, who shall be sole judge as to the classification of the business," could not avail to limit the exemption or to render liable to taxation that which would otherwise be outside its scope.

In their Lordships' view this is a misconstruction of the language of the proviso. The proviso is an exempting proviso, and, in order to obtain its protection, the taxpayer must bring himself within its language. It was not suggested that the regulations of the Minister of Customs and Excise at any relevant period would exempt the appellants. On the contrary, if valid, the regulations would necessarily bring this business within the scope of the tax. In their Lordships' view the effect of the proviso is only to exempt a sale of goods to the order of an individual customer by a business selling exclusively by retail where it can be shown that that business falls within the regulations made by the Minister of Customs and Excise, who is made sole judge as to the classification of the business.

In these circumstances the appeal fails with regard to the earlier period, equally with the latter. The result is that their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondent: *Charles Russell & Co.*

[PRIVY COUNCIL.]

J. C.* 1928 May 18.

W. E. A. MACAULEY . . . . . APPELLANT;

AND

JUDGES OF THE SUPREME COURT OF SIERRA LEONE AND ANOTHER } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE.

Sierra Leone—Legal Practitioner—Striking off Roll—Reasonable Cause—Partially civilized Country—Importance of Integrity of Bar—Supreme Court Ordinance (Sierra Leone), 1924, *s.* 57.

In a country which is only partially civilized it is necessary to induce the inhabitants to resort to the Courts for the settlement of their disputes rather than to personal violence; with that object it is essential that they should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but also for the honesty and fairness of those who practise before them.

The appellant, an enrolled barrister and solicitor of the Supreme Court of Sierra Leone, obtained by way of professional remuneration from a native chief, who was entirely illiterate and unfamiliar with legal proceedings, the sum of 135*l.* by professionally irregular conduct and 50*l.* (part of a larger demand) by misrepresentation. The Chief Justice, who by Ordinance had power, for reasonable cause, temporarily to suspend any barrister or solicitor, or to order his name to be struck off the roll of the Court, ordered the appellant's name to be struck off:—

Held, that the order should be affirmed, a mitigation of the penalty to a suspension from practice being refused, upon the ground that the authority of the Chief Justice in the matter should not be interfered with, having regard to the considerations above stated.

APPEAL (No. 14 of 1928) in forma pauperis by special leave from an order of the Chief Justice of the Supreme Court of Sierra Leone (April 20, 1927) ordering that the name of the appellant be struck off the roll of barristers and solicitors of the said Court.

The facts appear from the judgment of the Judicial Committee.

1928. April 27, 30. *Glanfield* for the appellant.

Hon. Stafford Cripps K.C. and *S. E. Pocock* for the respondents.

[Reference was made to *In re Iles.* (1)]

* *Present:* LORD HAILSHAM L.C., LORD BUCKMASTER, and LORD WARRINGTON OF CLYFFE.

(1) (1922) 66 Sol. J. 297 (P. C.).

May 18. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal from an order dated April 20, 1927, of the Chief Justice of the Colony of Sierra Leone, whereby it was ordered that the name of the appellant should be removed from roll of barristers and solicitors of the Supreme Court of the Colony.

By an Order of His Majesty in Council made on December 20, 1927, on the petition of the appellant, it was ordered that the appellant should be granted special leave to appeal in forma pauperis.

The appellant is a native of the Colony. He was called to the English bar by the Honourable Society of Lincoln's Inn on January 26, 1923. He then returned to the Colony, and was duly enrolled as a barrister and solicitor of the Supreme Court. In the Colony the two branches of the profession are united.

By the Supreme Court Ordinance of 1924 it was by s. 57 provided that the Chief Justice should have power for reasonable cause to suspend any barrister or solicitor from practising within the jurisdiction during any specified period or order his name to be struck off the roll of the Court. The order appealed from was made under this provision.

On February 4, 1927, the appellant was, at the instance of the acting Attorney-General of the Colony, served with a notice of motion and certain affidavits in support thereof, calling upon him to show cause why the Chief Justice should not, in the exercise of the power aforesaid, order his name to be struck off the roll of the Court or suspend him from practising within the jurisdiction of the said Court upon the grounds :—

(*a*) That after having accepted and agreed to hold a brief on behalf of the Hon. Claude Emile Wright, barrister-at-law, to represent the defendant in the case of *Macarthy* v. *Pa Kaini* then pending in the Circuit Court at a fee of 20 guineas, the appellant did on or about June 10, 1926, without any just reason and cause receive and obtain from the said Pa Kaini a certain large sum of money to wit, the sum of 135*l.* for or in respect of his appearance on behalf of the

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Hon. Claude Emile Wright in the said proceedings, contrary to good conscience and honest dealing and without the authority of the said the Hon. Claude Emile Wright. (*b*) That being briefed as aforesaid to defend Pa Kaini in the Circuit Court, the appellant did on or about July 1, 1926, demand from the said Pa Kaini a further sum of 200*l.* for his services in connection with the appeal to the Full Court then pending and did by the said demand induce the said Pa Kaini to deliver to him an additional sum of 50*l.* without the knowledge and authority of the said the Hon. Claude Emile Wright and without being authorized by the said the Hon. Claude Emile Wright to appear on his behalf in any appeal from the judgment of the Circuit Court.

The motion was heard by the Chief Justice on April 4, 5 and 7, 1927, on evidence, both oral and by affidavit, and on April 20, 1927, he delivered his judgment and made the order now under appeal.

Certain technical objections to the order were raised, both before the learned Chief Justice and before the Full Court, on an application for leave to appeal. These objections were overruled and leave to appeal was refused. These objections were not pressed before this Board, and the learned counsel for the appellant, who conducted the case with admirable tact and discretion, and said all that could be said on his client's behalf, confined himself to an attack upon the order on the merits.

The following facts were either admitted or proved to the satisfaction of the Chief Justice. Prior to June 8, 1926, Claude Emile Wright, a leading barrister and solicitor at Free Town, and a member of the Legislative Council of the Colony, had been instructed by the defendant to act for him in the action above mentioned, and had agreed to accept a fee of 30 guineas for so doing. Mr. Wright had received no instructions from Pa Kaini, his client, except the writ and particulars of damage. On June 8, 1926, Mr. Wright, finding that the case was to come on for trial in the Circuit Court at Moyamba in a day or two, and that he would be unable to undertake the defence himself, as he had to attend a meeting

of the Legislative Council, sent for the appellant, whom he knew as a son of his chief clerk, and asked him to hold the brief for him at a fee of 20 guineas. These terms were accepted by the appellant, and he went to Moyamba accordingly. Mr. Wright at the same time sent a telegram to his client in these terms: "Macauley representing me proceeds to Moyamba, your case. Please pay him retainer, 30 guineas." The appellant at the hearing admitted having seen this telegram, but stated that he did not remember its contents.

The appellant contended before the Chief Justice, and repeated this contention before this Board, that Mr. Wright had transferred the case to him, that it was then exclusively his own case, and that the relation of solicitor and client existed between himself and Pa Kaini, Mr. Wright being no longer concerned in the matter at all.

As to this point the learned Chief Justice on the evidence before him arrived at the following conclusions of fact: "I am unable to take the view that Mr. Wright ever handed over this case to Mr. Macauley in the sense that he entirely went out of the case and Mr. Macauley came into it," and again, "It is to my mind clear beyond all possible doubt that Mr. Macauley with full knowledge of his exact position entered on this transaction on one footing only, and that was that he went to Moyamba to hold Mr. Wright's brief for him in the Circuit Court in the action *Macarthy* v. *Pa Kaini* and agreed to accept 20 guineas for so doing."

There was ample evidence to support these findings, and no sufficient reason was alleged for rejecting them, but their Lordships feel it right to add that, having read the evidence, they concur in the findings. The second of the two findings that Mr. Macauley entered on the transaction with full knowledge of his exact position disposes of his contention before this Board that he honestly believed that the case was his own, whether it were so in fact or not.

Before stating what happened at Moyamba it is right to say something of the nature of the action, because the appellant has sought to justify his subsequent conduct by the suggestion

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that the case was one of great importance and difficulty, involving a heavy claim—upwards of 4000*l.*—against the defendant, and that the fee of 30 guineas was altogether insufficient.

The judgment of the circuit judge was delivered on June 12, the case having been opened on June 11. From this it appears that the plaintiff was a small trader in the defendant's village, and sued for damages on the allegation that the defendant as paramount chief had wrongfully interfered with his trade by picketing the plaintiff's shop and forbidding his people to trade with him. The defence was that the defendant's conduct was justified by the failure of the plaintiff to pay the settlers' fees. The circuit judge, after stating that the facts of the case were simple and largely not disputed, found that the defence was established, and gave judgment for the defendant. The judge added a comment on the exaggeration of the claim for loss of profit—at the rate of 12*l.* a day, exclusive of Sundays—nearly 4000*l.* per annum in respect of a small general store in a village of fifteen to twenty houses containing at least two other traders.

The appellant has given several accounts of what happened at Moyamba, the main difference between them being on the question whether he, the appellant, asked for a further fee or whether this was voluntarily offered by the chief. On this point the learned Chief Justice said: "I entertain no doubt that Mr. Macauley sought the interview at Moyamba and demanded 300 guineas. I entirely reject his assertion that the offer of a further fee came from Pa Kaini and that so to speak this money was almost forced upon him, the evidence to my mind absolutely refutes any such version of the matter."

Their Lordships accept this finding also, but whatever may be the precise circumstances, there is no doubt that the appellant required a further fee of 300 guineas, which, at the request of the chief and his followers, he reduced to 250*l.*, of which they paid him 105*l.* with a further sum of 30*l.* for expenses, making together 135*l.*, leaving 145*l.* still owing in respect of the fee. The chief was a native, entirely illiterate

and unfamiliar with such matters as those with which he was dealing. The appellant has sought to justify his request for the large further fee by the amount of work he says he had to do. It only amounts to this, that, inasmuch as neither Mr. Wright nor himself had received any preliminary instructions, he had to ascertain the facts of the case on the spot. As appears from the judgment of the circuit judge, the facts were simple and largely admitted. Their Lordships are not impressed by this excuse on the part of the appellant.

On his return to Free Town the appellant went to see Mr. Wright, and reported the result of the case. Mr. Wright then asked whether he wanted the balance of his fees, as Pa Kaini had sent him (Mr. Wright) 20*l.* The reply was to the effect that he did not want the balance, as they had made him a very handsome present. The appellant said nothing to Mr. Wright as to the case having been made over to him or as to his transactions with the chief in reference to the fee, and in fact Mr. Wright knew nothing of what had taken place until he heard of the facts through the District Commissioner in August.

In their Lordships' opinion, the first of the two charges was fully established, and it is clear that the appellant made use of his pretended position as solicitor in the case to the exclusion of Mr. Wright to obtain from an ignorant and unsophisticated native the promise of a fee out of all proportion to the importance of the case and the work done by him, and payment on account of 105*l.* with the further sum of 30*l.* for his expenses at the rate of 5*l.* a day for six days.

As to the second charge, the facts are that, on July 5, the appellant went to Mafengre, where Pa Kaini lived, and saw him and his nephew, Kapr Massim, and demanded a further fee of 200*l.* for conducting an appeal which he said had been commenced. This demand was made on the same pretence that the case had been transferred to him. On this occasion the chief paid him the further sum of 50*l.* mentioned in the second charge.

On July 19 the appellant wrote a letter to Pa Kaini, in which he demanded a further sum of at least 50*l.* on account

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of the promised fee of 200*l.* in respect of the appeal. In the course of that letter he said: "You must realise that I have a great deal to do in the matter and I wish to be refreshed now and again." As a matter of fact, he had had no work whatever to do in connection with the appeal. The further 50*l.* was not paid. At some time—but whether before or after the date of this letter is not quite clear—he was distinctly informed by Mr. Wright that he (Mr. Wright) was acting in the appeal. It is apparently still pending, and in it Pa Kaini is represented by Mr. Wright. Since July 19, as well as before that date, the appellant has had no work to do in connection with the appeal.

Their Lordships are of opinion that the second charge also was fully established and that the learned Chief Justice had "reasonable cause" for the exercise of the power conferred upon him by s. 57 of the Ordinance.

A strong appeal was made by counsel for a change of the sentence from one of removal from the roll to one of suspension only. No doubt the sentence is a severe one, as it deprives the appellant of the means of livelihood to which he has devoted much study and expense. But the learned Chief Justice is necessarily more familiar with the position of affairs in the Colony than are their Lordships.

In the course of his judgment he makes use of the following expressions: "It is a startling proposition and one which I cannot for a moment assent to that people holding the peculiar views which Mr. Macauley apparently does hold with regard to the relation or otherwise of solicitor and client should be allowed to run loose especially in such 'an Alsatia' as the Sierra Leone Protectorate without being answerable to any authority for their professional conduct."

Their Lordships appreciate the necessity in a country so described of inducing the inhabitants to resort to the Courts for the settlement of their disputes rather than to the possibly more familiar means of personal violence. For this purpose it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but for the honesty and fairness of those

who practise before them. To use the Chief Justice's words, the circumstances disclose "a disgraceful combination of rapacity and dishonesty," and their Lordships feel that if they were to recommend a mitigation of the sentence in this case they would be dealing a serious blow at the authority of the judge entrusted by law with the discipline of the profession in the Colony.

Their Lordships, however, cannot part with the case without commenting on one part of the judgment of the learned Chief Justice. He expressed the view that it ought to be inferred that the appellant and Kapr Massim were co-operating in obtaining the money in question from Pa Kaini. From the evidence before their Lordships they do not think such an inference should be drawn; enough, however, was proved without it to justify the order.

For the above reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, but, as the appellant appeals in forma pauperis, without costs.

Solicitors for appellant: *Leader, Plunkett & Leader.*
Solicitors for respondents: *Burchells.*

[PRIVY COUNCIL.]

J. C.* 1928 *May* 21.

SOUTH BRITISH INSURANCE COMPANY, LIMITED . . . . . } Appellants;

AND

GAUCI BROTHERS AND COMPANY . Respondents.

ON APPEAL FROM THE SUPREME COURT FOR EGYPT.

Egypt—Arbitration—Submission not filed in Court—Applicability of Rules of Supreme Court—Arbitrator refusing to act—Party declining to appoint—Dismissal of Action on Plea that an Award is Condition Precedent—Subsequent Arbitration—Jurisdiction of Arbitrators—Ottoman Order in Council, 1910, *arts.* 90, 99, 129.

The applicability of rules in relation to arbitration made by the Supreme Court for Egypt under art. 129 of the Ottoman Order in Council, 1910, is not confined to arbitrations under submissions filed in the Court under art. 99. Consequently, although a submission has not been so filed, if a party declines to appoint an arbitrator in place of one who has refused to act, the proper course is that laid down by r. 218 (3) of the Supreme Court rules—namely, to apply to the Court to fill the vacancy; the provisions of the (English) Arbitration Act, 1889, s. 6 are not brought into operation by art. 90 of the Order in Council.

When an action on a contract has been dismissed upon a contention by the defendant that an award is a condition precedent to the right to sue, and the claim is then submitted to arbitration, the defendant is precluded from contending that the award is bad in that the arbitrators had not jurisdiction to construe the contract, but only to determine the sum (if any) due.

Judgment of the Supreme Court for Egypt reversed.

Appeal (No. 109 of 1927) from a judgment of His Majesty's Supreme Court for Egypt dated June 15, 1927.

The appeal arose out of an action brought in the Supreme Court by the respondents, who, by the judgment, recover from the appellants the amount of an award dated December 7, 1926, in their favour, together with half the costs of the award.

The substantial question upon the appeal was whether the award was valid having regard to the procedure adopted.

* *Present:* Lord Hailsham L.C., Lord Buckmaster, and Lord Warrington of Clyffe.

The facts, and the material provisions of the Ottoman Order in Council, 1910, appear from the judgment of the Judicial Committee.

1928. May 3, 4. *Schiller K.C.* and *J. M. H. Wilson* for the appellants.

Neilson K.C. and *Linton Thorp* for the respondents.

May 21. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The appellants are an insurance company incorporated in New Zealand, but having an office in Alexandria where the respondents, who are British subjects, reside. On March 12, 1925, the respondents by a policy of that date insured certain pastels and paintings that were lying in their office against fire with the appellants. The total sum insured was 4300*l.*, but as stated in the policy, "not exceeding in each case respectively the sum or sums hereinbefore severally specified and stated against each property." A list of the pictures which was attached to and formed part of the policy contained a series of sums set against each article which on the face of the paper was declared to be "valued at" the particular figure to which it was opposite.

The policy also contained conditions that if any differences should arise as to the amount of any loss or damage, such difference should independently of all other questions be referred to the decision of an arbitrator to be appointed in writing by the parties, or if they could not agree upon a single arbitrator to the decision of two disinterested persons as arbitrators, with the further condition as to appointing an umpire, but it contained no provisions to meet the contingency of one arbitrator after appointment refusing to act. The actual terms of the article need not be considered apart from the last sentence which is in these words: "And it is hereby expressly stipulated and declared that it shall be a condition precedent to any right of action or suit upon this policy that the award by such arbitrator, arbitrators or umpire of the amount of the loss or damage if disputed shall be first obtained."

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On October 6, 1925, fire broke out in the respondents' premises and all the insured pictures were destroyed. The respondents gave due notice of the loss and thereupon the appellants in pursuance of their rights proceeded to make inquiries which appear to have been promptly and fully answered by the respondents. The appellants however, were not satisfied and declined to pay. From the first, the respondents took the view that the policy was a valued policy, a position which the appellants have throughout refused to accept.

It was obvious that with this point of difference between the parties it was impossible profitably to proceed until the true construction of the policy had been determined and to secure this the respondents on March 8, 1926, took proceedings against the appellants in His Majesty's Supreme Court for Egypt, claiming first the declaration that the policy was a valued policy, and secondly, payment of the amount. This action was defended upon the ground, that it was a condition precedent to such an action that there should be a reference to determine the amount of loss or damage and that until this had been done, no such action would lie. The real effect of such a defence was, of course, to suggest that the question of the construction of the policy was one of the matters which had to be dealt with by the arbitrators under the agreed terms of submission and the learned judge appears to have taken this view, for he on May 4, 1926, dismissed the action with costs and declined to consider the question of construction.

An attempt was then made to proceed with the arbitration. The respondents on August 5, 1926, nominated Mr. Irwin their arbitrator and called upon the appellants to nominate theirs. On September 13, 1926, the appellants accordingly appointed their arbitrator and on September 27 the two arbitrators appointed an umpire. The respondents early in the proceedings pointed out that the arbitrators would be asked to decide whether or not the policy was a valued policy, and thereupon, after some discussion, the arbitrator appointed by the appellants declined to act, except upon the clear statement that he was only asked to determine the actual

amount of the loss and damage. The respondents then requested the appellants to appoint another arbitrator and this not being done they appointed their arbitrator as sole arbitrator in accordance with the provisions of s. 6 of the Arbitration Act, 1889, and notified the appellants of the fact. Mr. Irwin accordingly proceeded to act alone and on December 20, 1926, published his award in which he found that the policy was a valued policy and that the sum of 4300*l.* should be paid by the appellants.

The appellants, who had refused to recognize the arbitration, declined to obey the award, and on April 11, 1927, proceedings were taken against them by the respondents, asking for payment of the amount awarded by the arbitrator. This action was heard by the same learned judge, who had originally determined the action, who characterized in strong language the conduct of the appellants, declared that "nothing could express more clearly than the policy itself the actual terms of the contract and the valuation put upon the property by the assurers and the assured," and gave judgment on the award in favour of the respondents. From his judgment this appeal is brought.

Two matters have been argued in its support. The first, that according to the terms of the policy, the question of construction was not for the arbitrator, and secondly, that the proceedings taken in the arbitration were irregular and that in consequence the award was void and the action could not be maintained.

With regard to the first point, their Lordships think it unnecessary, in the circumstances, to express any opinion. Even if upon the true construction of the contract the arbitrators never had power to determine its construction, but merely to assess the amount of damage and loss, the conduct of the appellants on the hearing of the first action prevents them being able to raise this point. The question of construction was then before the Court; there would be nothing on the appellants' own contention upon which the arbitration could take place if it were once held that the policy was a valued policy. But they caused the action to

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be dismissed and left the respondents to their remedy by arbitration with the necessarily implied result that they cannot now dispute the authority of the judgment they themselves invoked.

The second point is more difficult. Had the proceedings been regulated by the (English) Arbitration Act, 1889, the procedure adopted would have been in order. But an Order in Council called the Ottoman Order in Council, 1910, made by His Majesty in Council, laid down the code with regard to arbitration proceedings which was not obeyed. Art. 90 of the Order is in the following words: "Subject to the provisions of this Order, the civil jurisdiction of every Court acting under this Order shall, as far as circumstances admit, be exercised on the principles of, and in conformity with, English Law for the time being in force."

The provisions of the said Order as to arbitration are as follows: "99. (1.) Any agreement in writing between any British subjects, or between British subjects and foreigners or Ottoman subjects, to submit present or future differences to arbitration, whether an arbitrator is named therein or not, may be filed in the Court by any party thereto, and, unless a contrary intention is expressed therein, shall be irrevocable, and shall have the same effect as an Order of the Court. (2.) Every such agreement is in this Order referred to as a submission."

Art. 129 of the said Order, empowered the judge to make rules of Court, a power which has been exercised and the relevant r. 218 (3) provides that where an arbitrator refuses to act and the other parties decline to make an appointment to fill the vacancy, the Court may appoint an arbitrator. This is in marked distinction to the English rules which provide that in such event the arbitrator who has not refused to act can act alone. If therefore, these rules are binding, the proceedings were irregular and the real question for determination therefore, is whether they apply or no. The respondents' argument is that art. 99, which gives power to file in court an agreement in writing, governs the subsequent paragraph so that the phrase "such agreement" in para. 2 means

an agreement which has been filed and that the rules are only applicable to such an agreement.

Apart from the confusion that would arise from having two sets of rules applicable to a submission to arbitration depending upon whether it has been filed by one party or not, a fact that might not even be within the knowledge of the party who had not filed it, their Lordships think that the clear words of the Order contradict the respondents' contention. "Every such agreement" is the agreement in writing "to submit present or future differences to arbitration, whether an arbitrator is named therein or not," and what is subsequently done with the agreement does not affect its description in the following sub-section. The (English) Arbitration Act therefore does not apply. The conditions of the rules applicable were not obeyed and it follows that no award was ever made since Mr. Irwin could not act alone, and the proceedings must be begun again.

It is with extreme reluctance that their Lordships have come to this conclusion. The respondents have not been responsible for the delay that has taken place in settling their claim except so far as they blundered in the arbitration proceedings. The trouble has really been due to the appellants first resisting the decision of the Court on the question of the construction of the policy and then when it was attempted to raise it again before the arbitrators, the only tribunal open to the respondents, refusing to consent to that jurisdiction. It is in consequence of that action that the proceedings out of which this appeal arose became necessary, and though their Lordships think that the appeal must be allowed they do not think it would be right to decree costs against the respondents or to allow the appellants costs in the Supreme Court. In order that there may be no more delay, their Lordships think it right to add that without considering what may be the true meaning of the contract, the question of its construction has become by the act of the appellants the subject-matter of arbitration, and it must now go back to be so decided, the arbitration taking place in accordance with the terms of the contract as controlled by the Rules of the Court to which reference has been made.

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The order of the Supreme Court must therefore be reversed. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants : *William Charles Crocker.*
Solicitors for respondents : *W. Webb & Sons.*

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THE KING . . . . . APPELLANT ;

AND

CALEDONIAN COLLIERIES, LIMITED . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Legislative Power of Province—Taxation—Tax on Gross Revenue from Mine—Indirect Taxation—Tendency of Tax—Mine Owners Tax Act, 1923 (*Alb. Stat.*, 1923, *c.* 33)—*British North America Act*, 1867 (30 *&* 31 *Vict.*, *c.* 3), *s.* 92, *head* 2.

The Mine Owners Tax Act, 1923, of Alberta, purported to impose upon every mineowner, as therein defined, a percentage tax upon the gross revenue of his mine during each preceding month :—

Held, that the tax was not direct taxation within the meaning of s. 92, head 2, of the British North America Act, 1867, and that the Act was therefore ultra vires. The tax in its real nature was a tax upon sales, and the general tendency would be to pass it on to the purchaser ; it was not material that in particular circumstances it might be economically undesirable or practically impossible so to do, nor that the tax became payable before the sales took place.

Bank of Toronto v. *Lambe* (1887) 12 App. Cas. 575, 581, 582 followed.

Judgment of the Supreme Court of Canada [1927] S. C. R. 257 affirmed.

APPEAL (No. 12 of 1928) by special leave from a judgment of the Supreme Court of Canada (February 1, 1927) reversing a judgment of the Appellate Division of the Supreme Court of Alberta (May 19, 1926), which affirmed a judgment of the Chief Justice.

The sole question in the appeal was whether an Act of Alberta, the Mine Owners Tax Act, 1923, was intra vires the Provincial legislature as being " direct taxation " within the British North America Act, 1867, s. 92, head 2.

* *Present :* LORD HAILSHAM L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

The Chief Justice of Alberta held that the Act was intra vires, and that decision was affirmed by a majority of the Appellate Division.

Upon a further appeal the Supreme Court of Canada, in a judgment reported at [1927] S. C. R. 257, held that the taxation was indirect and the Act accordingly ultra vires.

The material provisions of the Act appear from the judgment of the Judicial Committee.

1928. May 7. *O. M. Biggar K.C.* and *Hon. Geoffrey Lawrence K.C.* for the appellant. The tax was direct taxation within s. 92, head 2, of the British North America Act, 1867. At the time the tax was payable the sales in respect of which it was imposed had already taken place; it was therefore impossible to pass the tax on to the purchaser. The time of demand is the moment to consider: *Attorney-General for Quebec* v. *Reed.* (1) There is no case in which a tax has been held to be indirect where the fund taxed is in the hands of the taxpayer when the tax falls to be paid. Further, the tax was in effect a tax upon property, of the nature of an income tax. It was therefore direct taxation, without any consideration of the question whether it would be passed on: *City of Halifax* v. *Fairbank's Estate.* (2) [Reference was made also to *Attorney-General for British Columbia* v. *Canadian Pacific Rly. Co.* (3) and *Treasurer of Ontario* v. *Canada Life Assurance Co.* (4).

Pritt K. C. and *H. S. Patterson* for the respondents. The test is not whether upon any particular sale the tax is passed on, but what is the general tendency of the tax. The taxation was in effect a tax on each sale of a commodity, and the tendency would be to pass it on in anticipation of the liability. It is to be presumed that that was the intention. [Reference was made to *Bank of Toronto* v. *Lambe* (5); *Cotton* v. *The King* (6); *Brewers' and Maltsters' Case* (7); *Security Export*

(1) (1884) 10 App. Cas. 141, 143.
(2) Ante, pp. 117, 123.
(3) [1927] A. C. 934.
(4) (1915) 33 Ont. L. R. 433.
(5) 12 App. Cas. 575.
(6) [1914] A. C. 176.
(7) [1897] A. C. 231.

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Co. v. *Hetherington* (1); *Attorney-General for Manitoba* v. *Attorney-General for Canada.* (2)

O. M. Biggar K.C. replied.

June 12. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. The question raised by this appeal is whether the Mine Owners Tax Act, 1923, of the Province of Alberta, which imposes upon mineowners as therein defined a percentage tax upon the gross revenues of their coal mines is ultra vires the Province as an attempt to impose indirect taxation.

The appeal, brought by special leave of His Majesty in Council, is from an order dated February 1, 1927, of the Supreme Court of Canada, whereby that Court, consisting of Anglin C.J. and Duff, Mignault, Newcombe and Rinfret JJ., unanimously allowed an appeal from the Appellate Division of the Supreme Court of Alberta in favour of the present appellant on the ground that in their opinion the tax in question is not a direct tax and therefore one which it was not within the competence of the Province to impose.

The Act in question was passed by the Legislature of Alberta on April 21, 1923. It contained the following material provisions: "Section 3. Every mine owner shall from the last day of May, 1918, be subject to a tax upon the gross revenue received by him from his mine. Section 4. The said tax shall not be more than 2 per cent. of the said revenue and as determined by the Lieut.-Governor in Council under the provisions of this Act. Section 6. On or before the last day of each month each mine owner shall forward to the Minister a sum of money equal to 2 per cent. of the gross revenue received by him from his mine during the next preceding month."

The Act repealed a previous Act of the Province—the Mine Owners Tax Act, 1918—which also imposed a tax upon gross revenue, taking the form in that Act of 5 c. per ton of the coal removed from the mine premises. The validity of this tax had been disputed by the mineowners who had in many cases refused to pay it.

(1) [1923] S. C. R. 539, 559. (2) [1925] A. C. 561.

On August 14, 1925, the Lieutenant-Governor by and with the advice of the Executive Council ordered that the tax in question should be 2 per cent. of the gross revenue received by the mineowner from his mine.

The respondent company is a mineowner within the definition of that term contained in the Act in question. They began business in November, 1923. They refused to pay the tax, and on August 21, 1925, the action, in which the order under appeal was made, was commenced for the purposes of recovering the amount of the tax alleged to be due from them.

Is the taxation in question "direct taxation within the Province" within the meaning of s. 92 of the British North America Act, 1867?

The question whether a tax is direct or indirect has on many occasions been the subject of decision by this Board, but it is unnecessary to refer to any of these decisions except that of *Bank of Toronto* v. *Lambe* (1), in which Lord Hobhouse, in delivering the judgment of the Board, made some useful observations as to the mode in which the question should be approached.

The passage has often been cited, but it is worth while citing it again: "First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or, rather necessary, to have careful regard to such opinions, as has been said in previous cases before this Board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words 'direct,' and 'indirect,' according as they find that the burden of a tax abides more or less with the person who first pays it. This distinction is illustrated very clearly by the quotations from a very able and clear thinker, the late Mr. Fawcett, who, after giving his tests of direct and indirect taxation, makes remarks to the effect that a tax may be made direct

(1) 12 App. Cas. 575, 581, 582.

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or indirect by the position of the taxpayers or by private bargains about its payment. Doubtless, such remarks have their value in an economical discussion. Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist's definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The Legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies."

What then is the general tendency of the tax now in question?

First it is necessary to ascertain the real nature of the tax. It is not disputed that, though the tax is called a tax on "gross revenue," such gross revenue is in reality the aggregate of sums received from sales of coal, and is indistinguishable from a tax upon every sum received from the sale of coal.

The respondents are producers of coal, a commodity the subject of commercial transactions. Their Lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser. Under particular circumstances the recovery of the tax may, it is true, be economically undesirable or practically impossible, but the general tendency of the tax remains.

It is said on behalf of the appellant that at the time a sale is made the tax has not become payable, and therefore cannot be passed on. Their Lordships cannot accept this contention; the tax will have to be paid, and there would be no more difficulty in adding to the selling price the amount of the tax in anticipation than there would be if it had been actually paid.

Their Lordships therefore agree with the views expressed by the judges of the Supreme Court that the tax in question is not a direct tax.

Some attempt was made in argument to support the tax on the ground that it is analogous to an income tax, which has always been regarded as the typical example of a direct tax; but there are marked distinctions between a tax on gross revenue and a tax on income, which for taxation purposes means gains and profits. There may be considerable gross revenues, but no income taxable by an income tax in the accepted sense.

For these reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Blake & Redden.*
Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

ROMAN CATHOLIC SEPARATE SCHOOL TRUSTEES FOR TINY AND OTHERS . } APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Ontario)—Education—Roman Catholic Separate Schools—Rights at Confederation—Courses of Study and Grades of Education—Share in legislative Grants — Separate Schools Act, 1863 (26 *Vict. c.* 50, *Can.*), *s.* 20 — *British North America Act*, 1867 (30 & 31 *Vict. c.* 3), *s.* 93, *sub-ss.* 1, 3.

The trustees of a Roman Catholic separate school in Ontario, by a petition of right, claimed that certain Acts of the legislature of Ontario, and regulations made thereunder, were ultra vires, in that, and so far as, they prejudicially affected rights which the suppliants asserted that Roman Catholics had by law at Confederation in respect of separate schools, and which consequently were preserved by s. 93, sub-s. 1, of the British

* *Present:* VISCOUNT HALDANE, LORD BUCKMASTER, LORD SHAW, LORD WRENBURY, and LORD BLANESBURGH.

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North America Act, 1867. They claimed: (1.) the right to establish and conduct courses of study and grades of education such as are conducted in continuation schools, collegiate institutes, and high schools; (2.) the right of supporters of Roman Catholic separate schools to exemption from rates for the support of continuation schools, collegiate institutes, and high schools not conducted by their own board of trustees; (3.) that separate schools were entitled under the Separate Schools Act, 1863, to share on the basis therein enacted, in all legislative grants for common schools, including all grants for the support of secondary schools; they prayed for judgment for the difference between the sum which they would have received out of the legislative grant for 1922 if their contentions were right, and the amount paid to them:—

Held, that statutes passed before Confederation gave to the educational authorities full power to regulate separate schools, including power to determine the courses of study and grades of education therein; also, that the fund in which separate schools were entitled to share as enacted by the Separate Schools Act, 1863, s. 20, excluded moneys "otherwise appropriated by law," as expressed in the Common Schools Act, 1859, s. 106, and that it was not ultra vires after Confederation to make new appropriations, although they diminished what otherwise would have come to the separate schools. That consequently the suppliants' claim failed in law, but that it was open to them to appeal under s. 93, sub-s. 3, of the British North America Act, 1867, to the Governor-General in his quasi administrative capacity even if the legislation complained of was intra vires, since the words "any Provincial authority" in that sub-section included the Provincial legislatures.

Brophy v. *Attorney-General of Manitoba* [1895] A. C. 202 followed on the point last mentioned.

Judgment of the Supreme Court of Canada [1927] S. C. R. 637, which dismissed (being equally divided in opinion) an appeal from the Appellate Division of the Supreme Court of Ontario (60 Ont. L. R. 15), affirmed.

APPEAL (No. 158 of 1927) by special leave from a judgment of the Supreme Court of Canada (October 10, 1927) affirming on an equal division a judgment of the Appellate Division of the Supreme Court of Ontario (December 23, 1926), which affirmed a judgment of Rose J.

The appeal arose out of a petition of right brought in the Supreme Court of Ontario by the appellant board of trustees on behalf of themselves and all other boards of trustees of Roman Catholic separate schools in Ontario

The petition claimed that certain Acts of the legislature of Ontario, and regulations made thereunder, were ultra vires, in that, and so far as, they prejudicially affected rights which they asserted that Roman Catholics had by law at the Union in respect of separate schools, and which consequently were

preserved by s. 93, sub-s. 1, of the British North America Act, 1867. (1)

The nature of the rights claimed appears from the judgment of the Judicial Committee. Shortly stated they were: (1.) The right to conduct courses of study in Roman Catholic separate schools in Ontario similar to those in continuation schools, collegiate institutes, and high schools; (2.) that Roman Catholics in Ontario were exempt from taxation for the support of such schools and institutions not conducted by their own board of trustees; (3.) the right of separate schools under the Separate Schools Act, 1863, s. 20, to share in legislation grants for common schools on the basis which they asserted was the basis at Confederation—namely, unaffected by grants for the support of secondary education. They prayed for judgment for the difference between the amount which they as trustees were entitled out of the legislation grant for 1922 if their claims were valid, and the amount paid to them; also for declarations that the following enactments of Ontario were ultra vires: 34 Vict. c. 33, ss. 36, 40; 6 Edw. 7, c. 52, s. 23, sub-s. 6; 7 Edw. 7, c. 50, s. 4, sub-ss. 3, 4; 10 Edw. 7, c. 102, s. 1; R. S. Ont., 1914, c. 265, s. 6; R. S. Ont., 1914, c. 268, ss. 33, 34, 37, 38, 39; 12 & 13 Geo. 5, c. 98, ss. 2, 3; 14 Geo. 5, c. 82, s. 2.

The petition of right, as amended in the Appellate Division, is set out in full in the report of the appeal to the Supreme Court of Canada.

The petition was heard by Rose J., who by a judgment reported at 59 Ont. L. R. 96 dismissed it. An appeal to

(1) British North America Act, 1867 (30 & 31 Vict. c. 3), s. 93, sub-ss. 1, 3:—

"93. In and for each Province the Legislature may exclusively make laws in relation to education, subject and according to the following provisions: (1.) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law in the Province at the Union..... (3.) Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the Legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

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the Appellate Division (Mulock C.J.O. and Magee, Hodgins, Ferguson, and Grant JJ.A.) was unanimously dismissed. The appeal is reported at 60 Ont. L. R. 15. Upon a further appeal to the Supreme Court of Canada the learned judges were divided in opinion. Anglin C.J. and Rinfret J. concurred in a judgment allowing the appeal on all points. Mignault J. agreed save as to the legislative grants; he was of opinion that the Act of 1863 did not apply to special grants or grants for particular purposes. Duff, Newcombe, and Lamont JJ. were of opinion that the appeal should be dismissed. The judgments are reported at [1927] S. C. R. 637.

1928. Feb. 21, 23, 24, 27, 28; March 1, 2, 5, 6. *Hellmuth K.C.* and *T. F. Battle* for the appellants.

Tilley K.C. and *McGregor Young K.C.* for the respondent.

June 12. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. Their Lordships are fully aware that this appeal is among the most important that have come before them from Canada in recent years. It relates to the interpretation of the Constitution of Canada in regard to the separate schools of a large part of her Roman Catholic population, and to the character of the rights conferred on them by the legislative settlement made at the time of Confederation under the British North America Act. So far as concerns the question brought before the Judicial Committee of the Privy Council, it will be found to be a question of pure law, turning on the interpretation and application of words in that Act. But it is none the less a question of far-reaching importance to Canada as a whole, and it has given rise to great differences of opinion among the judges of the Canadian Courts. The tribunals of Ontario, indeed, before whom the question came in the first instance, decided unanimously against the appellants' claim. But the learned judges of the Supreme Court, to which it was taken on appeal, were evenly divided.

Their Lordships have now to determine the point in issue as one of pure legal interpretation, disregarding every other consideration. This was the principle adopted by the Canadian

judges, and it is one which their Lordships have to apply anew, seeking to decide the appeal on the footing of an examination of the provisions of the Constitution of Canada.

It will be necessary in the course of this judgment to refer in outline, later on, to the history of education in Canada, and particularly to the phase of that history which is concerned with the development of the provisions made in regard to religious education. But before entering on this it is desirable to formulate distinctly the real point in this appeal and the nature of the proceedings by which it has been raised. These proceedings took the form of a petition of right presented by the appellants to the Supreme Court of Ontario. The petition claimed that certain Acts of the legislature of that Province, and certain regulations purporting to have been passed under these Acts, prejudicially affected the rights conferred by the British North America Act on the appellants and were ultra vires. The appellants asked for a declaration that the Acts of the legislature, which had sought to alter the basis of distribution of legislative grants which existed at the date of Confederation, were ultra vires so far as concerned separate schools, and for judgment for a sum equal to the difference between the amount paid to the trustees of the Roman Catholic School for school section No. 2 in the Township of Tiny, out of the legislative grant of the Province for 1922, and the amount that would have come to it if effect had been given to the Separate School Act, 1863, which was in force at Confederation, and created (it is claimed) a right which the legislature of the Province had no power after Confederation to affect prejudicially. The appellants also claimed that they had the right to establish and conduct in their own schools courses of study and grades of education such as were being conducted in continuation schools, collegiate institutes and high schools, and that all regulations purporting to affect that right were invalid. They asked for a further declaration that the supporters of Roman Catholic separate schools were exempt from the rates imposed for the support of the former kind of schools, unless established or conducted by boards of trustees of Roman Catholic separate schools.

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All of these claims were traversed by the Attorney-General of Ontario on behalf of the Government of Ontario.

The question which has to be decided is one of far-reaching magnitude. To understand its scope it is necessary to have in mind the history of education in Canada, including that of s. 93 of the British North America Act, 1867. That section embodies a compromise. The language proposed by the conferences of delegates from the various parts of Canada, which passed resolutions at Quebec on October 10, 1864, was not adopted, so far as the final arrangement was concerned, in the form in which the resolutions were passed: see Cartwright's Cases on the B. N. A. Act, vol. ii., Quebec resolution No. 43. Resolution 43 proposed to give power to the local legislatures to make laws as to education, saving the rights and privileges which the Protestant and Catholic minority in both Canadas might possess as to their denominational schools at the time when the Union came into operation. In the British North America Act, as passed by the Imperial Parliament, the substance of this resolution is not included in s. 92, but is embodied in a separate section, 93. The separate section enacts that in and for each Province the legislature may exclusively make laws in relation to education, subject and according to certain provisions. These provisions were: (sub-s. 1) that nothing in such law should prejudicially affect any right or privilege with respect to denominational schools which any class of person had by law in the Province at the Union; (sub-s. 2) all the powers, privileges and duties at the Union, conferred and imposed in Upper Canada on the separate schools and school trustees of the Queen's Roman Catholic subjects are extended to the dissentient schools of the Queen's Protestant and Roman Catholic subjects in Quebec (on this sub-section no question arises in the present appeal); and by sub-s. 3, as follows: "Where in any Province a system of separate or dissentient schools exists by law at the Union or is thereafter established by the legislature of the Province, an appeal shall lie to the Governor-General in Council from any Act or decision of any Provincial authority affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects

in relation to education." The fourth sub-section enacts that if a Provincial law which seems to the Governor-General in Council requisite to give effect to his decision is not made or the decision is not executed, then the Parliament of Canada may make the necessary remedial law.

It will be observed that sub-s. 3 goes further than sub-s. 1 in material respects. In the first place, it applies not merely to what exists at the time of Confederation, but also to separate or dissentient schools established afterwards by Provincial legislatures. In the second place, the word "prejudicially," in sub-s. 1, is dropped out from before the expression "affecting," in sub-s. 3. In the third place, the right or privilege is not confined to one in respect of denominational schools, but is given in respect of education. Their Lordships think that these changes in language are significant. They show that the protection given by sub-s. 1 was deemed, if taken by itself, to be insufficient. It was not considered to be enough protection for the denominational schools to apply to them a restriction which only rendered ultra vires of the Provinces a law which took away what was an existing legal right or privilege at the time of Confederation in respect of denominational schools. Sub-s. 3 contemplates that within the powers of the Provincial legislature Acts might be passed which did affect rights and privileges of religious minorities in relation to education, and gives a different kind of remedy, which appears, as has already been pointed out, to have been devised subsequently to the Quebec resolutions of 1864, and before the bill of 1867 was agreed on. Whenever an Act or decision of a Provincial authority affecting any right or privilege of the minority, Protestant or Roman Catholic, in relation to education is challenged, an appeal is to lie to the Governor-General in Council, as distinguished from the Courts of law. No doubt if what is challenged is challenged on the ground of its being ultra vires, the right of appeal to a Court of law remains for both parties unimpaired. But there is a further right not based on the principle of ultra vires. That this is so is shown by the extension of the power to challenge to any system of separate or dissentient schools established

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by law after Confederation, and which accordingly could not be confined to rights or privileges at the time of Confederation. The omission of the word " prejudicially " in sub-s. 3 tends to bear out the view that something wider than a mere question of legality was intended, and the language of sub-s. 4, enabling the Dominion Parliament to legislate remedially for giving effect, " so far only as the circumstances of each case require," to the decision of the Governor-General in Council, points to a similar interpretation. What is to be dealt with is a right or privilege in relation to education.

Their Lordships are of opinion that where the head of the executive in council in Canada is satisfied that injustice has been done by taking away a right or privilege which is other than a legal one from the Protestant or Roman Catholic minority in relation to education, he may interfere. The step is one from mere legality to administrative propriety, a totally different matter. But it may be that those who had to find a new constitution for Canada when the British North America Act was passed in 1867, came to the conclusion that a very difficult situation could be met in no other way than by transferring the question from the region of legality to that of administrative fairness.

There is no question before their Lordships in this case concerning any appeal to the Governor-General in Council, and they abstain from saying anything as to the principles on which, if invoked, he may think fit to proceed. But the view that the rights of the appellants are not necessarily confined to rights under sub-s. 1 has an important bearing on the construction of that sub-section, inasmuch as it no longer takes away all remedy in cases to which the principle of ultra vires does not apply. It may even be that the power conferred on the Governor-General in Council enables him to take into account the considerations arising out of what had been done in the course of de facto administration, which James L.J. excluded in delivering the judgment of the Judicial Committee in 1874, in *Maher* v. *Town of Portland*, reported in Wheeler's Confederation Law of Canada, and quoted by the late Lord Chancellor in delivering his recent judgment

of the Committee in *Hirsch* v. *Protestant School Commissioners of Montreal* (1) on February 2 last. The question is one of administrative policy, and it is not before their Lordships. They desire, however, to observe that the view now expressed as to the relations of sub-ss. 1 and 3 of s. 93 is substantially the same as that taken in *Brophy* v. *Attorney-General of Manitoba*. (2) In that case the question arose under the Constitution Act of Manitoba, 1870, a Dominion Act under which, as subsequently confirmed by Imperial statute, Manitoba became one of the Provinces of the Dominion of Canada. The Act contains in s. 22 provisions which for present purposes are identical with those of sub-ss. 1, 3 and 4 of s. 93 of the British North America Act. It is true that in the second and corresponding sub-section of the Manitoba Act the appeal is expressly stated to lie against any Act or decision of the legislature of the Province as well as of any Provincial authority, thus in words saying more than in sub-s. 3 of s. 93 of the Act of 1867. But Lord Herschell in *Brophy's* case (3) expressed his dissent from the argument that the insertion of the additional words in the Manitoba Act showed that in the Act of 1867 it could not have been intended to comprehend the legislatures under the words "any Provincial authority." Their Lordships agree with his view, and they are of opinion that the legislatures are so comprehended. The point may prove to be one of great importance if there is hereafter an appeal to the Governor-General in Council. In *Brophy's* case the Roman Catholic minority in Manitoba appealed to the Governor-General in Council under sub-s. 2 of s. 22 of their Constitutional Act on the ground that rights and privileges of theirs in relation to education had been affected by two statutes of the legislature of Manitoba passed in 1890, which set up a general system of non-sectarian education. The schools of the Roman Catholic minority were deprived of their previously existing proportionate share of the money contributed for school purposes out of the taxes, while for the new non-sectarian schools they were both taxed and

(1) Ante, pp. 200, 210. (2) [1895] A. C. 202.
(3) [1895] A. C. 221.

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assessed for rates. It had been held, in *City of Winnipeg* v. *Barrett* (1), that the statutes of 1890 did not affect any right or privilege with respect to their schools which the Roman Catholics of Manitoba had by law or practice in their Province at the Union in 1870. The only right or privilege which they then possessed was to establish and maintain for the use of members of their own Church such schools, at their own expense, as they pleased. In *Barrett's* case this was the only question before the Judicial Committee, and it was held that the Acts of 1890 were not ultra vires.

But in *Brophy's* case the question was the wholly different one, whether the rights and privileges of Roman Catholics in relation to education had not been so affected by the Act of 1890 as to enable an appeal to the Governor-General in Council in a quasi administrative capacity. It was held that there was such affection, in fact although not in law, inasmuch as Roman Catholics were to be taxed and rated for the upkeep of schools which were obnoxious to their religious opinions in regard to education. It was no point of illegality. What was decided was that the Governor-General in Council had power to entertain such an appeal under sub-s. 2 of s. 22 of the Constitutional Act, corresponding, as their Lordships have already stated, to sub-s. 3 of s. 93 of the British North America Act, 1867.

Their Lordships have dwelt on what was decided in *Brophy's* case (2) in reference to the scope of the appeal against the affection of rights or privileges within the meaning of sub-s. 3 of s. 93 of the British North America Act, with a view to bringing out the limitation which has to be placed on the expressions used in sub-s. 1. The rights and privileges there referred to must be such as are given by law, and the redress which may be given in respect of prejudice to them, caused by laws made by the Provincial legislatures which, in other respects, have the exclusive power of legislation in relation to education, is a redress based on the principle of ultra vires. Such redress can therefore, for the reasons given in *Brophy's* case, be sought from the Courts of law alone. The other remedy which

(1) [1892] A. C. 445. (2) [1895] A. C. 202.

sub-ss. 3 and 4 afford not only supplements the former but affords cogent reason why sub-s. 1 should be construed as being confined strictly to questions of ultra vires. Were the Acts and regulations complained of in the petition of right assailable under this principle? In order to answer this question it is necessary to understand clearly what was their nature, and to understand this it is essential to see what has been the development of the system of education in Upper Canada.

Before 1867 there were in Canada schools of three principal classes—common schools, grammar schools and separate schools. Since Confederation there have come into existence continuation schools, collegiate institutes and high schools, which have developed out of the three kinds of school last mentioned. The claim of the appellants is that, in 1867, Roman Catholics in Upper Canada enjoyed by law the right to establish denominational schools, to be conducted by boards of trustees chosen by themselves; that, as regards selection of text-books and courses of study, the control of these belonged to the boards of trustees, who could sanction in their schools courses of study co-extensive in scope with those, since Confederation, pursued in high schools, collegiate institutions and continuation schools. The case made was that the trustees could do this in the separate schools, inasmuch as these, although common schools, were not under the old order of things, restricted in their scope as regards education of pupils up to twenty-one years of age. It is argued for the appellants that under s. 93, sub-s. 1, the Roman Catholics of Ontario continued to enjoy these autonomous rights, coupled with a consequential right of exemption from taxation for the purposes of the high schools, collegiate institutes and continuation schools, which, it is said, are mere forms of what fall within the scope of existing separate schools, and are, therefore, of a kind for which the Roman Catholics were exempt from taxation.

Their Lordships may say at once that if such a right was really conferred on the boards of separate schools, the right and the title to grants dependent on it were not interrupted

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by the Act of 1867. It was held by Rose J., who tried the case, and by the Appellate Division of Ontario, that the newly created Province of Ontario was not affected by any obligation in regard to this, and that the separate school trustees had consequently, after Confederation, no legal right to share in any appropriation or grants to be made by the new Province of Ontario for common school purposes. For this conclusion reliance was placed on s. 20 of the Separate Schools Act of the United Province of 1863, which enacts that " every separate school shall be entitled to a share in the fund annually granted by the legislature of *this Province* for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes, now made or hereafter to be made by the Province of the municipal authorities, according," etc. The learned judges of the Appellate Court, who did not differ from the judgment of the first judge in the case, have held that the right granted by the Act of 1863 was confined to a right to a share of the grants made by the old United Province of Canada, and had no application to the new Ontario established at Confederation. It was true, they said, that under s. 129 of the British North America Act all laws in force in Canada at the Union were continued in Ontario as if the Union had not been made, but subject to repeal or alteration by Parliament or by the legislature of Ontario. They thought, however, that to enact that a law shall continue in force after the Union is not to declare that the meaning of that law shall be changed by the Union, and there was nothing to indicate that a law relating to distribution of moneys voted by the legislature of the old Province of Canada should govern legislation after the Union. The Act of 1863 might not be repealed, but the fund with which it dealt was no longer in existence.

The Supreme Court of Canada did not adopt this view. The Chief Justice of Canada emphatically dissented from it, and none of the other learned judges who sat with him, not even those who were in favour of approving the judgment, expressed themselves as differing from his dissent. The Chief Justice of Canada thought the conclusion reached below

on this question to be at variance with the spirit and intent of s. 93, sub-s. 1, of the Act of 1867. Unless the legislatures of Ontario and Quebec were debarred from prejudicially affecting the rights and privileges which the religious minorities possessed in regard to their denominational schools in regard to maintenance and support, the protection given by the section would be illusory. On this point their Lordships are in full agreement with the Chief Justice of Canada. Sect. 93 was, in their view, obviously meant to apply to the future as well as to the past, and to the new Province of Ontario.

This consideration leads up to the crucial point in this appeal. Did the trustees of the separate Roman Catholic schools secure at Confederation a right to maintain, free from control or regulation by the legislature of Ontario, as respects the scope of instruction, denominational schools which could embrace the subjects formerly taught in the separate schools on their higher sides, and afterwards taught in the undenominational high schools, collegiate institutes and continuation schools, as developed after Confederation, or analogous subjects taught in the Roman Catholic separate schools before Confederation, and to exemption from taxation for the support of such undenominational educative organizations? And did the trustees secure a title to receive a share of every grant by the legislature for common school purposes, construed as extending to the maintenance of education of the type given in post-Confederation secondary schools, as well as in those that were merely elementary, based on the number of pupils attending the separate schools, and independent of the subjects taught, or the text-books used, every separate school being entitled to its share, calculated according to a statutory rate, however advanced, however rudimentary, the education and books might be? If these questions are answered in the affirmative then it was ultra vires of Ontario to take away the right either to regulate the schools in a manner inconsistent with this freedom, or to diminish the grants or to tax for the support of the undenominational schools, by legislation, or administratively, so far as control was concerned, by State regulation.

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The question is a very serious one. Before Confederation the common schools and with them the separate schools were left free, by statute (see Upper Canada Common Schools Act, 1859, s. 16), to educate pupils up to the age of twenty-one, and some of them were in the habit of giving to the older pupils advanced teaching such as would fit them to enter the University. But Roman Catholics find a great difficulty in sending their sons and daughters to the higher schools which have now been established for the purposes of this advanced teaching. As the Chief Justice of Canada has said, denominational education is based on the idea that the separation of secular from religious education may be advantageous. But Roman Catholics, at least, hold that religious instruction and influence should always accompany secular training.

What, then, were the rights of the supporters of the separate schools at the time of Confederation? To answer this, and the question of ultra vires which arises out of it, it is necessary to look at the history of the development of education in Canada.

In the end of the eighteenth century there had been grants made for the establishment and support of schools for the children of the inhabitants of the Province of Upper Canada. These grants were at first grants of land, and the schools to be established were to be such as appear then to have been somewhat loosely called grammar schools. The schools were put on a statutory basis by an Act of the Legislative Council and Assembly of Upper Canada, passed in 1807, and were in that Act called "public schools," which were to be managed by trustees nominated for each school district. In 1816, under another Act, grants of money were made by the legislature for the benefit of the schools, which were in that Act and the subsequent Acts renamed common schools, and local boards of education were set up. The trustees were to manage the schools and make regulations for them, but they were to report every three months to the proper board as to the regulations and the books used in the schools, and the board was to control the regulations and the books.

By an Act of the Province in 1820, further moneys were granted from the taxes for the use of common schools, and by a later Act of 1824, still more money for the extension of moral and religious instruction, and for the development of the common schools, was directed to be applied. Yet further grants were made by a statute of 1833. By a later statute of 1839 provision was made for the assistance of a university college, as well as for the grammar schools which had grown up in the Province, and for the appropriation of the proceeds of land granted for their maintenance.

In 1840 an Imperial Act was passed uniting Upper and Lower Canada into a single Province of Canada, with one Legislative Council and Assembly. Up to this date what had been established were common and grammar schools. They appear to have been undenominational, although provision was made for moral and religious instruction. In 1841 a change of policy was made, for in that year an Act was passed which not only provided for the further organization and endowment from provincial funds of the common schools, but enabled a superintendent of education to be appointed who was, among other things, to promote uniformity in the conduct of common schools throughout the Provinces. There were to be commissioners elected for each township and parish, who were to regulate the courses of study to be followed and the books to be used. The chief change in policy made by this Act was that where a body of the inhabitants of a township or parish dissented from the regulations of the commissioners, they could appoint trustees to take over the powers of common school commissioners and to establish and maintain common schools "in the manner and subject to the visitation, conditions, rules and obligations" provided for other common schools, and to receive a due proportion according to their number, of the moneys coming from taxes and rates for the support of common schools. By a later section the Governor was to appoint a board of examiners for each city and town corporate, one half of them to be Roman Catholics and the other half

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Protestants, each half to perform the duties in respect of the schools attended by children of its own religion.

Although the term " separate " is not in this Act applied to any school, it is plain that the Act initiated the principle of separate schools. And it is also plain that, so far as control by the State was concerned, the new separate schools were in all material respects under the same control as the ordinary common schools.

In 1843 the policy described was further extended. The supervision of education by the Government of the United Province was developed. The establishment of Protestant and Roman Catholic schools, with teachers of their respective persuasions, was again provided for, and such schools were in this Act described as " separate " schools. But all such " separate schools " were to be subject, by s. 56, to the visitations conditions, rules and obligations of common schools. Normal schools for the training of teachers, and model schools in which the principal teachers were to be certified by a normal school, were also provided for. In 1846 this Act was superseded by a new Common Schools Act. A superintendent of Schools for Upper Canada was to be appointed, whose powers extended, among other things, to the provision and recommendation of uniform and approved text-books in all the schools. There was to be also a Board of Education for the Province. The limits of age for children attending the common schools were to be from four to sixteen. The principle of separate schools, with a right to receive a share of appropriations proportionate to the number of children attending the respective separate schools, was continued, and the separate schools were declared to be subject to the regulations obtaining with regard to other common schools.

Their Lordships do not think that the statutes which were subsequently passed down to 1855 bear materially on the question before them. It is plain that the policy laid down from the commencement of the nineteenth century up to 1855 was to place all the common schools, including the separate schools, which were merely a special form of these, under ultimate State regulation. By the Grammar Schools Act

of 1853 the instruction in a grammar school was to extend to the higher branches of practical English and commercial education, including the elements of natural philosophy and mechanics, and also to Latin, Greek and mathematics, so as to prepare students for University education. There was also provision for uniting some of the common schools with grammar schools, a provision which indicates that, subject to regulation, there was no very definite limitation imposed on what might be taught in a common school. The tendency of the legislature up to this point was to bring education in Upper Canada, subject to minor variations, into a single system.

By 1855 the Roman Catholic population in Upper Canada had apparently increased in numbers and importance. For an Act was passed in that year, known as the Taché Act, which put the separate schools for Roman Catholics on a new footing. Meetings could be convened of persons desiring to establish separate schools, and they could select trustees, who became bodies corporate, and might become boards for the united separate schools of a city or town. The trustees were to have all the powers of rating and collection from persons sending children to their schools that the trustees of common schools had in respect of their schools. They were to be bound to perform all duties required of the latter, and their teachers were to be subject to similar regulations. The supporters of the separate schools were exempted from rates for future common schools and common school libraries. Each of the new separate schools was to be entitled to a share in the fund annually granted by the legislature for the support of the pupils attending it, proportionate to the average numbers attending it. The trustees were to report to the Chief Superintendent of Education as to the average attendance, and he was to determine the share of grants to be received.

Meantime, statutory grants were made for improving the position of the grammar, normal and model schools. In 1859 a Consolidating Act was passed by what had become the Legislative Council and Assembly for the now United

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Province of Canada. This Act related to common schools. It did not make any important changes in the law, but aimed, for the most part, at bringing together the existing statutory provisions relating to common schools. Many of the provisions of this Act were embodied by reference in the Act respecting separate schools passed in the same years as stated below. The office of Chief Superintendent of Education was reconstituted. He was to be under the direction of the Governor. The duty of the Chief Superintendent under the General Consolidating Act now cited was among other things, under s. 106, to apportion in each year "all monies granted or provided by the legislature for the support of common schools in Upper Canada, and not otherwise appropriated by law, to the several counties, townships, cities, &c.," according to ratio of population.

There was also to be a Council of Public Instruction of nine persons, appointed by the Governor. Among other things it was to make regulations for the organization, government and discipline of common schools, for the classification of schools and teachers, and for school libraries, and to examine, and at its discretion to recommend or disapprove of text-books for the use of schools or school libraries. By s. 120 the Governor could authorize the expenditure, in Upper Canada, out of the share of the legislative school grant and the additional moneys granted in aid of common and grammar schools "and not otherwise expressly appropriated by law" of certain sums for purposes which were not connected with the separate schools. By s. 121, the whole of the remainder of the grants mentioned in s. 120 and not exclusively appropriated in its sub-sections, were to be expended in aid of the common schools according to the provisions of the Act. There was a conscience section (129) in the Act.

In the same year (1859) the Separate Schools Act, already referred to, was passed. The main provisions of the Common Schools Act of 1859 were thereby made applicable to the separate schools, but the new Act was designed in sub-ss. 18 to 36 to make clear what was the position in particular of

Roman Catholic separate schools. The existing provisions for these were repeated with variations, and it was enacted that the trustees of each separate school should perform the same duties and be subject to the same penalties as trustees of common schools. By s. 33 every separate school was again to be entitled to a proportionate share in the annual grant for common schools. The trustees were to report the names and attendance of the children attending these schools to the Chief Superintendent, who was thereupon to determine what they were entitled to receive out of the legislative grant.

It is now necessary to refer to the final Separate Schools Act, passed in 1863, which substituted a new set of provisions in the Act of 1859, in place of ss. 18 to 36, which were by this Act repealed. Amongst those new provisions was s. 20, a re-enactment with additions of the old s. 33 of the Act of 1859; and a section which their Lordships set out later in their judgment.

The appellants contend that the words in s. 106 of the Common Schools Act of 1859 "not otherwise appropriated by law" includes the share of the apportioned fund to which they are entitled under s. 20 of the Act of 1863, and shows that they are not excluded from sharing in all the moneys appropriated outside those "granted or provided by the legislature for the support of common schools." But their Lordships think that this is erroneous and that the learned judges were right who thought that the separate schools are only entitled to share in the moneys "granted by the legislature for the support of common schools not otherwise appropriated by law," and also by the Act of 1863 in all other public grants made for common school purposes. The appropriations form in short a first debit item against the money grant. After that, after the appropriations have been made and the debit item satisfied, comes the second stage—namely, that of apportionment; and it is in this apportionment that the separate schools have their share. The apportionment mentioned in s. 106, sub-s. 2, is not that of the total fund, but only of that fund after the trustees

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of the separate schools had received their share. This their Lordships regard as the true meaning of the Act.

This statute of 1863 is an important one. Its declared purpose was to restore to Roman Catholics in Upper Canada certain rights in respect of separate schools, and to bring the law respecting separate schools more into harmony with the law respecting common schools. It was in force at Confederation, and it has been spoken of as the charter of the denominational schools. The chief points in it were that separate school sections, whether in the same or in adjoining municipalities (not only, as in the earlier Act, the schools in one ward of a city or town), might be joined in a separate school union section. The teachers of separate schools were to be subject to the same examinations, and to receive certificates of qualification in the same way as common school teachers generally. Supporters of separate schools were to be exempt from payment of municipal rates for common schools and libraries, while they continued to be supporters of separate schools, and not merely for the current year, as under the old legislation. The Roman Catholic separate schools were to be subject to such inspection as might be directed by the Chief Superintendent of Education, and were to be subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada. All judges, members of the legislature, heads of local municipal bodies, the Chief Superintendent and the local superintendent of common schools, and clergymen of the Roman Church, were to be visitors of these separate schools.

Sect. 20 is a section to which much of the argument at their Lordships' bar was directed. It is in these terms: "Every separate school shall be entitled to a share in the fund annually granted by the legislature of this Province for the support of common schools, and shall be entitled also to a share in all other public grants, investments and allotments for common school purposes now made or hereafter to be made by the Province or the municipal authorities, according to the average number of pupils attending such

school during the twelve next preceding months, or during the number of months which may have elapsed from the establishment of a new separate school, as compared with the whole average number of pupils attending school in the same city, town, village or township."

By s. 21, local assessments for common school purposes were excluded from the money to which the separate schools were to be entitled. By s. 26 the Roman Catholic separate schools were to be subject to such inspection as might be directed from time to time by the Chief Superintendent and were to be "subject also to such regulations as might be imposed from time to time by the Council of Public Instruction for Upper Canada."

The questions which arise on this Act are, first of all, whether, having regard to the provisions quoted, laws have been enacted by the Province which prejudicially affect any legal right or privilege with respect to denominational schools which the Roman Catholic community (a class of persons) had obtained under these statutes at the Union. The second question is whether under these statutes the Roman Catholic schools had become entitled at the Union to grants which were fixed and could not be taken away or interfered with by the authorities of the Province. It has been to render the nature of these questions clear that their Lordships have considered it necessary to examine at some length the history and character of the legislation before Confederation.

The petition of right claims that the suppliants have a legal title to establish and conduct courses of study, with grades of education, such as are now conducted in what are designated as continuation schools, collegiate institutes, and high schools, and that any statutes and regulations purporting to limit or prejudicially affect this title are ultra vires. The petition further claims that the class of persons represented by the petitioners are exempt from payment of rates imposed for the support of these organizations when not established by trustees of Roman Catholic separate schools. Consequentially on their claim the petitioners ask that the trustees of the Roman Catholic separate schools for section 2, Township

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of Tiny, may have paid to them certain moneys to which it is said that they would have been entitled on the footing that the general claim as to validity is properly established.

The appellants say that the old common schools were allowed to give such education as was found suitable to pupils up to twenty-one, who were thereby prepared for the University, and that the separate schools enjoyed the right thus permitted, and possessed it at Confederation. For this purpose the classes in the schools were in point of fact "graded." The Courts of Ontario have held in the present case that while this grading was de facto permitted it was always subject to the regulations by which the State authorities might from time to time alter and define the work in the common (including the separate) schools. Subject to this supervision, "grading" might take place either in the classes of a single school, or by distributing the teaching where there was a group of schools, as in urban municipalities. It is said for the appellants that the only rival of the common and separate schools as they were up to and after Confederation, was the grammar school, which was not under the common school Acts, but was always organized under separate statutes. The appellants further argued that an Act passed after Confederation in Ontario in 1871 for the improvement of the common and grammar schools really transformed both the common and the grammar schools. They were rearranged in two divisions, in one of which free education was to be given up to the age of twelve, such division to be called a "public school." The other division was to be a "high school," and to give higher instruction with the aid of the old grammar school grant, and of contributions from local revenues by the municipal authorities. The Boards of grammar school trustees were to take over these high schools, and to administer them under regulation.

The appellants contend that the common school was at the Union entitled to provide for the public, other than separate school supporters, education of every kind which in the judgment of its trustees it was desirable to give, and that

some of the urban common schools were then known as high schools, in which the teaching extended as far as that in the grammar schools, and was substantially that prescribed for the new high schools after the Act of 1871. The new public and high schools were, it is argued, just divisions of pre-Confederation common schools, with compulsory taxation for the new high schools. From such taxation, it is said, the Roman Catholic separate school supporters must be exempt, and they cannot be affected by the combination brought about by the Act of 1871.

Of the post-Confederation continuation schools, which were established by statutes of 1896 and 1908, it is said that these began by being only continuation classes in public schools in municipalities in which no high school had been established, but were by the Act of 1908 made into continuation schools supported by grants and rates. In any view, as they cannot be given the form of separate schools, Roman Catholics should be free from taxation for them. Of collegiate institutes, it is said that they are only certain high schools to which a special name has been given.

The petition also claims that certain sections in various statutes which infringe the principles thus contended for are ultra vires.

The Provincial Legislature is supreme in matters of education, excepting so far as s. 93 of the British North America Act restricts its authority. Sub-s. 1 preserves as they stood any rights and the privileges given in relation to denominational schools by law in 1867. The question, therefore, is whether the Province could then as the law stood so control the courses of study and the general range and quality of the text-books used, as to enable the educational authorities of the Province to prescribe the gradation of the separate school and the stages in which instruction should be given in it. Examination of the statutes and of the history of the subject have satisfied their Lordships that, while a settlement was come to in 1863 with both Roman Catholics and Protestants, a settlement which in so far as it remained unaltered at Confederation, must be strictly maintained, the Province

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showed in the wording of the successive earlier statutes the intention to preserve for the rest the power to mould the educational system in the interests of the public at large, as distinguished from any section of it, however important. This consideration does not relieve a Court of law from the obligation to confine itself strictly to the meaning of the words which define the legal rights, but it must be borne in mind in the interpretation of the language relating to regulation.

The examination of the series of statutes relating to education from 1807 onwards has led their Lordships to the view that the Province did provide for the regulation, in the full sense, of its common or public schools. It is not necessary to repeat the citations which have already been made. It is sufficient, for showing what regulation means, to refer to s. 6 of the Act of 1816, which delegated to the trustees of the common schools the power to make rules and regulations for their good government, the condition of the schools to be reported to the Board of Education, with the branches taught, the state of education, the number of the scholars, and things that might benefit the schools directed by the trustees. The Board was to have power to superintend these common schools and to make reports to the Governor, which should be laid before the legislature. This policy was maintained through the Acts which followed. In 1841 a Superintendent of Education for the Province was appointed to visit the schools and apportion the moneys voted. Common School Commissioners were set up for the various districts, with instructions to regulate for each school the course of study to be followed in it, and to establish general rules for the conduct of the school, to be communicated to the teachers. There were also to be appointed by the Governor boards of examiners (half to be Protestant and half to be Roman Catholic) to examine persons recommended as teachers, and to regulate for each school separately the course of study to be followed, the books to be used, and the general rules for the conduct of the schools. The Act of 1841 enabled, indeed, dissentient inhabitants to call for separate common schools and to appoint their own trustees, but these schools

were to be subject to the "visitation, conditions, rules, obligations and liabilities" of ordinary common schools. This provision was repeated in the Act relating to common schools of 1843 (s. 56) and in the Act of 1846 (s. 33). In the Act of 1850 it is expressly provided (s. 19) that the separate schools are to be under the same regulations as to the persons for whom the school is permitted to be established as common schools generally, and by s. 9 of the Separate Schools Act of 1863 it is provided that the trustees of separate schools are to perform the same duties and be subject to the same penalties as the trustees of common schools. Sect. 26 subjects these schools to such inspection as the Chief Superintendent may direct, and also to such regulation as the Council of Public Instruction may impose.

It is this principle and purpose which appear to their Lordships to be dominant through the statutes, and the language used in the sections just quoted has brought this Committee to the conclusion that the power of regulation must be interpreted in a wider sense than that given to it in the judgment of the Chief Justice of Canada. They are not at one with him in thinking that separate school trustees could give secondary education in their schools otherwise than by the permission, express or implied, of the Council of Public Instruction. The separate school was only a special form of common school, and the Council could in the case of each determine the courses to be pursued and the extent of the education to be imparted. A full power of regulation, such as the purpose of the statutes quoted renders appropriate, is what suggests itself, and this is the natural outcome of a scheme which never appears to have really varied. Such expressions as "organization," "government," "discipline" and "classification," do, in their Lordships' interpretation of them, imply a real control of the separate schools. The duty of the Judicial Committee is simply to interpret the words used. It may be that even if the contention of the appellants as to the scope of sub-s. 1 is shut out, there will remain to them a remedy of a wholly different kind in the shape of an appeal under sub-s. 3 to the

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Governor-General in Council in an administrative capacity. That question does not arise in this appeal and is in no way prejudiced by the conclusion to which their Lordships have come.

What has been said on the subject of ultra vires in regard to regulation also applies to the title to fixed grants. The appellants rely on s. 20 of the Separate Schools Act of 1863, a section which has been already quoted. It declares every separate school to be entitled to a share in the fund annually granted by the legislature for the support of common schools, and also to a share in all other public grants, investments and allotments for common school purposes, according to a defined proportion. It is argued that their share of these grants is being withheld from the appellants and from the Roman Catholic separate schools generally. But the question really turns on whether the authorities of the Province had power to make apportionments and payments out of the funds granted before the balance was arrived at which should be available for common school purposes. In their Lordships' opinion it is clear that there was such power. Sect. 106 of the Common School Act of 1859 defined as the duty of the Chief Superintendent to apportion the moneys granted or provided by the legislature " and not otherwise appropriated by law " in a manner analogous to that subsequently provided by s. 20 of the Act of 1863. Sect. 120 of the 1859 Act enabled the Governor to make a number of appropriations out of the sums granted, and s. 121 provides that the whole of the remainder of the grants mentioned and not exclusively appropriated in the earlier sub-sections are to be expended in aid of the common schools according to the provisions of the Act.

In their Lordships' view, in the face of the provisions referred to, it is impossible to contend successfully that it was ultra vires after Confederation to make new appropriations out of the grants which would diminish what would otherwise have come to the appellants. Whether the case is looked at from the point of view of regulation, or whether it is regarded from that of discretion in power of appropriation,

the result is the same. It is indeed true that power to regulate merely does not imply a power to abolish. But the controversy with which this Board has to deal on the present occasion is a long way from abolition. It may be that the new laws will hamper the freedom of the Roman Catholics in their denominational schools. They may conceivably be or have been subjected to injustice of a kind that they can submit to the Governor-General in Council, and through him to the Parliament of Canada. But they are still left with separate schools, which are none the less actual because the liberty of giving secondary and higher education in them may be abridged by regulation. Such an abridgment may be in the usual course when a national system of education has attained a certain stage in its development, and it would be difficult to forego this power if the grading which may be essential is also to be possible. Their Lordships do not think grading is in itself inconsistent with such rights to separation of schools as were reserved at Confederation.

Copious reference has been made in the argument to the reports, circulars and instructions which were issued with reference to educational administration by the Chief Superintendent and other officials, from time to time, before Confederation. These documents are not relevant in construing s. 93, but they do show what the administrative system was, and as doing so, they have been legitimately referred to. In the report in 1846, Dr. Ryerson, who was then Assistant Superintendent and shortly afterwards became Chief Superintendent, gave his first account of the system which was being progressively built up. He laid stress on the control of text-books and on the provision of normal schools in which to train teachers. His activities, and the work of those who were setting themselves to the same task of developing the administrative side of the education problem, are fully summarized in the elaborate judgment of Rose J., who tried the case. While their Lordships do not agree with that learned judge in the view, taken by himself and the other Ontario judges, that there was no Province of Canada after 1867 to which the principle of ultra

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vires applied, they observe the thoroughness of his judgment in other respects and the way in which he has covered in detail the field of controversy. He devoted much of his judgment to pointing out that the real question is whether the legislation subsequent to 1871 has prejudicially affected the appellants' rights, first, by depriving separate school supporters of the power to conduct such schools as were actually being conducted at Confederation by common school trustees in certain localities, and secondly, by making separate school supporters liable for rates for the support of schools which have been set up to do some of the work which separate schools had a legal right to do.

It is a satisfaction to have had the advantage in a case so important and complicated as this, of judgments so thorough and exhaustive as these, both in the Supreme Court of Canada and in the Ontario Courts.

For reasons which now sufficiently appear, their Lordships will humbly advise His Majesty that this appeal should be dismissed. There will be no order as to costs.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

GRAY AND OTHERS . . . . . APPELLANTS ; J. C.*
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PERPETUAL TRUSTEE COMPANY, LIMITED, AND ANOTHER . . . . } RESPONDENTS. *June* 12.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Mutual Wills—Husband and Wife—Power of Appointment—Fresh Will by Wife after accepting Benefit—Absence of Agreement not to revoke—No implied Trust—Election—Approbation and Reprobation—Terms of Will not putting to Election.

The fact that a husband and wife have simultaneously made mutual wills, giving each to the other a life interest with similar provisions in remainder, is not in itself evidence of an agreement not to revoke the wills ; in the absence of a definite agreement to that effect there is no implied trust precluding the wife from making a fresh will inconsistent with her former will, even though her husband has died and she has taken the benefits conferred by his will. Although by the mutual wills the wife expressly has refrained from exercising a power of appointment which her husband had only in default of her exercising it, and he has appointed, the wife can both take the benefit of her husband's will and exercise her power of appointment, unless the language of his will either puts her to her election, or places her in the position of seeking at the same time to approbate and reprobate its provisions.

Dufour v. *Pereira* (1769) 1 Dick. 419 ; Hargr. Jurid. Arg. 304 : and *Lord Walpole* v. *Lord Orford* (1797) 3 Ves. 402 explained.

In re Oldham [1925] Ch. 75 approved.

Judgment of the High Court of Australia 39 C. L. R. 473 affirmed.

APPEAL (No. 159 of 1927) by special leave from a judgment of the High Court of Australia (December 16, 1927) reversing a judgment of the Supreme Court of New South Wales in Equity (October 29, 1926).

The appeal arose out of an originating summons issued by the respondent, the Perpetual Trustee Company, Ld., the sole trustee of a post-nuptial settlement made by Lawrence Hargrave, deceased, in 1879. The substantial question raised by the summons was whether the respondent Margaret Hudson was entitled absolutely by way of appointment under the will of her mother Margaret Preston Hargrave,

* *Present :* LORD HAILSHAM L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

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dated July 18, 1923, to the whole of the property then subject to the trusts of the settlement, or whether by virtue of the execution of two wills executed by the said Lawrence Hargrave and his wife Margaret Preston Hargrave on October 29, 1914 (referred to as mutual wills), and the circumstances leading up to the execution of them, and the fact that the testatrix, M. P. Hargrave, took the benefits conferred upon her by the will of Lawrence Hargrave, the property comprised in the settlement was held by Margaret Hudson upon trust to give effect to the said will of her father L. Hargrave dated October 29, 1914.

The facts are stated in the judgment of the Judicial Committee.

Harvey J., the Chief Judge in Equity, by a judgment reported at 26 S. R. (N. S. W.) 615, declared that the trustees, the respondent company, held the property comprised in the settlement upon the same trusts as those upon which it would have been held if the testatrix, M. P. Hargrave, had died without having revoked her will of October 29, 1914.

An appeal to the High Court of Australia was allowed by a majority, consisting of Isaacs, Higgins and Starke JJ.; Knox C.J. and Rich J. dissented. The opinions of the learned judges respectively are stated shortly in the present judgment; they appear fully in a report of the appeal at 39 C. L. R. 473.

1928. May 11, 14, 15. *Macmillan K.C.* and *A. C. Nesbitt* for the appellants. By reason of the mutual wills, and the circumstances attending and following their execution, the wife was debarred from making a later will so as to affect the provisions of her earlier will. There arose an implied trust upon the principle applied in *Dufour* v. *Pereira*. (1) The fullest report of Lord Camden's judgment is in Hargrave's Juridical Arguments (2), being a reproduction from the MS. in his own handwriting. The same principle was applied in *Stone* v. *Hoskins* (3), and in

(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

(2) It was stated that the family to which the present appeal related were descended from the author of the above work.

(3) [1905] P. 194.

Denyssen v. *Mostert* (1) it was recognized by the Privy Council. In *Dufour* v. *Pereira* (2) there was no evidence extraneous to the mutual will itself; Lord Campden refers to taking the benefits conferred by it as a confirmation of the arrangement then made. In the present case the verbal evidence as to what took place before the wills of 1914 were executed establishes an implied agreement that the wills should not be revoked. *In re Oldham* (3) is distinguishable, first because there was no evidence apart from the making of the earlier wills, and secondly because as the wills gave each party an absolute interest in the property it could be dealt with inter vivos, so that no effective agreement or trust could arise. [Reference was made also to *Lord Walpole* v. *Lord Orford* (4); *In re Estate of Heys* (5); and *In re Parkin.* (6)] Apart from the principle of mutual wills, Mrs. Hargrave was put to her election either to take under her husband's will or to reject it and retain her power of appointment. She could not both approbate and reprobate the provisions of his will: *Pitman* v. *Crum-Ewing.* (7) A case of election arose because in 1914 Mr. Hargrave had no power of appointment; his will dealt therefore with property which was in his disposition and property which was not. Mrs. Hargrave by taking under his will released her right to appointment, or agreed that it should be exercised in the manner in which he had exercised it: *Whistler* v. *Webster* (8); *Green* v. *Green.* (9)

W. A. Greene K.C. and *Louis Gluckstein* for the respondent, Margaret Hudson. The argument for the appellants is based upon (1.) election, (2.) agreement giving rise to a trust, and (3.) implied release of the power of appointment; it is necessary to keep these three grounds separate. No case of election can be set up unless it arises upon the language of the will: White and Tudor, 8th ed., vol. i., p. 449. Mr. Hargrave did not on the face of his will express any intention that the gift to his wife should be conditional upon her

(1) (1872) L. R. 4 P. C. 236, 253.
(2) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
(3) [1925] Ch. 75.
(4) 3 Ves. 402.
(5) [1914] P. 192.
(6) [1892] 3 Ch. 510.
(7) [1911] A. C. 217.
(8) (1794) 2 Ves. Jun. 366 (*a*).
(9) (1845) 2 J. & Lat. 529.

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not exercising the power of appointment. Further, a case of election arises under a will only where the testator purports to deal with another's property, or, possibly, to exercise a power which he does not possess : *Dummer* v. *Pitcher*. (1) Mr. Hargrave, however, had a defeasible, not a contingent, power of appointment in 1914 ; nobody could tell whether he or his wife would die first. In *Pitman* v. *Crum-Ewing* (2) the facts were entirely different from those in this case.

The principle in *Dufour* v. *Pereira* (3) does not apply, unless there is a contract creating an equitable interest in the property : *Lord Walpole* v. *Lord Orford* (4) ; *In re Oldham*. (5). The evidence in the present case shows no such contract ; there was no agreement by the husband not to revoke his will. In *Dufour* v. *Pereira* (3) there was only one will executed by both spouses ; had there been separate wills the result would have been different.

Thirdly there was no release by the wife of her power to appoint. A contract to release a power of appointment operates only if it creates or confirms equitable interests in the subject of the power ; an equitable interest cannot be created by a contract with a third person : *Isaac* v. *Hughes* (6) ; *In re Sugden's Trusts*. (7) There was no evidence as to any contract between the spouses as to the exercise of the power or its release.

Macmillan K.C. replied.

June 12. The judgment of their Lordships was delivered by

VISCOUNT HALDANE. In this case the question is whether the appellants are entitled to the reversal of a judgment of the High Court of Australia, delivered by a majority on appeal from a decision of the Supreme Court of New South Wales (Harvey, Chief Judge in Equity), which was reversed by the High Court.

What was held by the High Court was that Mrs. Hargrave, the testatrix in this case, was entitled to revoke her will of

(1) (1833) 2 My. & K. 262.
(2) [1911] A. C. 217.
(3) 1 Dick. 419 ; 2 Hargr. Jurid. Arg. 304.
(4) 3 Ves. 402.
(5) [1925] Ch. 75.
(6) (1870) L. R. 9 Eq. 191.
(7) [1917] 2 Ch. 92.

October 29, 1914, and to make a different will of July 18, 1923. It was further held that the latter will was a good execution of a general power of appointment contained in a settlement dated January 25, 1879, and made between her and her husband, Lawrence Hargrave, who predeceased her. This settlement was a post nuptial one, consisting entirely of the husband's property. That was vested in a trustee (1.) upon trust for such persons and purposes as the wife should, with the consent of her husband during his life and afterwards at her own discretion, by deed or will appoint. The wife had thus, in case of her surviving her husband, an unrestricted general power of appointment; (2.) upon trust for the wife for life, and after her death, and in default of appointment by her; (3.) upon trust for such persons and purposes as her husband should by deed or will appoint, and in default and subject thereto; (4.) on trust for the husband for life and after his death; (5.) on trust for the child or children of the marriage of Mr. and Mrs. Hargrave absolutely, with an ultimate trust in default of children for her husband in fee.

The trusts of this settlement are stated above in outline. The wording is quite clear. The main trust, stated more precisely, was for such ends, intents and purposes as Mrs. Hargrave should at any time or from time to time, with the consent of her husband during his life, and after his decease at or in her uncontrolled discretion, notwithstanding any future coverture, by deed or deeds or by will appoint, and in default of and until and subject to any and every such appointment, upon trust during her life for her separate use, and after her decease and in default of and subject to any and every such appointment by her as aforesaid, upon such trusts as the husband should by deed or will appoint, and subject to such appointment by him as aforesaid for him during his life and after his death for the children of the marriage absolutely, and in default of such children for the husband absolutely.

No appointment by deed was made, but on October 29, 1914, the husband and wife both made wills, and these were contemporaneous. By the husband's will he left all his property, including all his "estates, real and personal,"

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over which he had a power of appointment by virtue of the settlement of January 25, 1879, to trustees for sale, conversion and investment, and to pay the income to his wife, Margaret Hargrave, for her life, and after her death to pay such income until the death of the last of his children equally between his surviving children and the issue surviving them of those that were dead, and after the death of the last of his children the trustees were to distribute the trust funds among all the grandchildren then living per capita and not per stirpes. It must be borne in mind that the husband's power under the settlement was subordinate to that of the wife, which had been made paramount.

The will of the wife, made on the same date, was in some points different. She appointed the respondent company to be her trustee and executor. She expressly refrained from exercising the power of appointment vested in her by the settlement of 1879. She left all her real and personal estate (excluding what she could appoint under the general power just referred to, which she had declared her intention not to exercise) to her trustee upon trust for conversion and investment, and to pay the income to her husband for his life, and then to her children surviving her (with representation), and after the death of the last of her children to distribute the corpus among her grandchildren then living per capita, with substitution of the issue of any of them who had died before the period of distribution leaving issue.

It is clear that the general power remained intact in her, although she had not exercised it, subject, of course, to any questions to which its subsequent exercise by her might give rise. So far there was no complication. In 1915 she made a codicil, leaving two annuities to be paid by her trustee out of what she had vested in the trustee by her will. In July, 1915, her husband died, and thenceforward Mrs. Hargrave took the benefits conferred on her by his will. On September 15, 1919, Mrs. Hargrave made another will, in which she again expressed an intention not to exercise the general power given to her by the settlement of 1879, but gave out of her own estate annuities, including one of 250*l.*

a year, to her daughter Margaret, the present respondent. For the rest this new will did not interfere materially with the provisions of the will of 1914.

But on July 18, 1923, Mrs. Hargrave made a further will, which did interfere with these provisions completely. She had moved to London, and when there by this new will she "devised and bequeathed all her real and personal estate" to her daughter the respondent, Margaret Hudson, absolutely and appointed her the sole executrix.

Mrs. Hargrave died in October, 1923, and letters of administration with the will annexed were granted at Sydney to the respondent company.

There is no doubt that the terms of this final will were such as to amount to an exercise of the general power conferred on Mrs. Hargrave by the settlement of 1879. It is not in controversy that, although no intention to include the exercise of the power was expressed in this will, it must be taken to have been exercised under the general words of disposition, by virtue of either s. 23 of the Wills, Probate and Administration Act of New South Wales, or by virtue of s. 27 of the (English) Wills Act, if she was domiciled at her death in England. On this assumption the will disposes of property comprised in the settlement amounting to over 12,000*l.*

Their Lordships have to decide two questions which have been brought before them. The first is whether the simultaneous wills of Mr. and Mrs. Hargrave were mutual wills made under such circumstances that neither the husband nor the wife could revoke or modify them without the assent of the other. The second question is whether a case of election has arisen. As to the first question, it is necessary to turn to the evidence of the circumstances under which the wills of 1914 were made. The evidence is somewhat meagre. But it appears that by September, 1914, the respondent company had been appointed sole trustee of the settlement of 1879, and that Mr. and Mrs. Hargrave went to the office of the company to express their desire that their disposable property should go in the same way among their children and grandchildren. They had

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then four children and two grandchildren. Mr. Bennett, an official of the respondent company, gave evidence that on September 22, 1914, Mr. and Mrs. Hargrave came to the office of the respondent company and discussed how they should make their wills, so that the property disposed of should go among their children after their deaths. Mr. Bennett had no exact recollection of what passed, but he thought that something was said by Mr. Hargrave to the effect that if he made a will leaving everything to her for life with remainder to the children for life, and then to their children, would she not do the same? and that she said she would. Mr. Douglas, another official of the company, gave evidence to much the same effect, adding that it was arranged that the husband should make an appointment of the funds in the settlement, and that his wife should by her will negative any intention on her part to exercise her power.

This last provision appears to be the result of a belief in the minds of the parties that the non exercise by the wife of her power might effect a saving of death duty.

The Chief Judge in Equity (Harvey J.), who tried the case, was of opinion that it could not be said that the evidence established that there was an actual bargain between the husband and the wife that they should make wills in identical terms, in the sense that each refused to make a will unless the other agreed to do so. On this point of fact Knox C.J., on the appeal to the High Court, agreed with him, although he felt constrained by the authorities to dismiss the appeal. Isaacs J., however, took a different view, and held that the arrangement made amounted to an actual agreement. He was in favour of allowing the appeal, but on different grounds. Higgins J. held that there was no agreement to make the wills irrevocable, and was for allowing the appeal. Rich J. held that, as the wife when she succeeded had bound herself in equity to give effect to her husband's appointment and not to exercise her own power, a ground which did not depend on the mere effect at law of the establishment of a contract such as Harvey J. had discussed, but on equitable interests which he thought had arisen, the appeal should be dismissed.

Starke J. thought that the husband and wife were not making stipulations binding either in law or in equity, but were only settling the division of their property in the measure which seemed fair to them at the moment. He was therefore in favour of allowing the appeal.

Harvey J. had decided for the appellants on the ground that although no binding contract was proved, still it was established by authority that where mutual wills are made by two persons as the result of some understanding or arrangement between them, this was enough, although it might not amount to a binding contract in law, to give rise to equities.

Their Lordships are in agreement with Harvey J. and the other learned judges in Australia who have held that no binding contract was established by the evidence. What they have to consider is the proposition as to the effect in equity laid down by Harvey J. as stated.

There was a particular authority which was relied on by the appellants for the proposition that if two persons simultaneously make wills to the same effect, and in that sense mutually, a second will made by one of them after succeeding to the other's estate under the originally made will is precluded from being treated as effective to interfere in equity with the existing disposition. This authority was the well known case of *Dufour* v. *Pereira* (1), decided by Lord Camden in 1769. The decision has been fully discussed in a book of authority, Hargrave's Juridical Arguments. The volume last named contains a very full account by the learned editor of a discussion of the case in its early stages by Lord Loughborough, who in 1797 finally decided the very question in *Lord Walpole* v. *Lord Orford*. (2) In *Dufour* v. *Pereira* (1) the conclusion reached was that if there was in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was at least treated as a relevant circumstance, to be taken into account in determining whether there was such

(1) 1 Dick. 419; Hargr. Jurid. Arg. 304. (2) 3 Ves. 402.

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an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in equity which might emerge, although it was a fact which had in itself to be established by evidence, and in such cases the whole of the evidence must be looked at. It was upon this ground that Lord Loughborough, in the later case of *Lord Walpole* v. *Lord Orford* (1), dismissed the claim founded on the principle of Lord Camden's judgment, holding that no sufficiently definite agreement had been proved.

The most recent judgment on the effect of mutual wills made by husband and wife, without independent evidence of any contract, is that of Astbury J. in *In re Oldham.* (2) That learned judge subjected the authorities to a careful examination, and came to the conclusion that the mere fact that two wills were made in identical terms does not of necessity imply any agreement beyond that so to make them. In the case before him he found that there was not sufficient evidence of any further agreement, and that there was nothing in the authorities referred to in the argument that constrained him to decide otherwise.

Their Lordships agree with the view taken by Astbury J. The case before them is one in which the evidence of an agreement, apart from that of making the wills in question, is so lacking that they are unable to come to the conclusion that an agreement to constitute equitable interests has been shown to have been made. As they have already said, the mere fact of making wills mutually is not, at least by the law of England, evidence of such an agreement having been come to. And without such a definite agreement there can no more be a trust in equity than a right to damages at law.

This disposes of the first of the contentions which were put forward at the bar for the appellants. The second contention was that Mrs. Hargrave was put to her election either to take under her husband's will, or to reject it if she desired

(1) 3 Ves. 402. (2) [1925] Ch. 75.

to retain the general power of appointment, and that having elected to take under his will, she could not afterwards create new interests under the power which could prevail in equity. This contention is, in the opinion of their Lordships, untenable. They are unable to find language in the husband's will which either puts the wife to her election, or puts her in the position of seeking at the same time to approbate and to reprobate its provisions. The husband's will disposed of his own property and also purported to exercise his own power of appointment under the settlement. But under the settlement his power was subordinate to the paramount power of the wife, who was enabled to override everything. This paramount power the wife expressly refrains from exercising in her will of 1914. But not the less she abstained from extinguishing it, and confines the operation of her will to her own property. Their Lordships therefore find no reason for holding that she was in any way precluded from exercising her general power subsequently, or for doubting that in law she must be taken to have done so by her final will of 1923. This being so, there is no inconsistency, and there is no room for any question of election arising.

For these reasons they will humbly advise His Majesty that the appeal should be dismissed. They are always reluctant to give unsuccessful appellants their costs. But in this case the questions which have arisen are so obviously the result of the obscure and unusual procedure of the husband and wife in relation to the settlement of 1879 that they think that the costs of all parties as between solicitor and client should be paid out of the settled funds.

Solicitors for appellants : *Light & Fulton.*
Solicitors for second respondent : *Bartlett & Gluckstein.*

[HOUSE OF LORDS.]

H. L. (E.)* 1928 *July* 18.

THE KING (ON THE PROSECUTION OF PEGLER) . . . . . } APPELLANT;

AND

COMMISSIONERS OF CUSTOMS AND EXCISE AND OTHERS . . . . . } RESPONDENTS.

Revenue—Licensed Premises—"Tied" House—Increased Duty on Licences imposed by Finance (1909–10) *Act*, 1910—*Tenancy commencing after Passing of Act—Right of Lessee to recover Proportion of increased Duty from Landlord—Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 46.

Sect. 46 of the Finance (1909–10) Act, 1910, which confers on a lessee of "tied" licensed premises the right to recover from the brewers a proportion of the increased licence duty imposed by s. 43 of the Act, does not apply to tenancies entered into after the passing of the Act:—

So *held* by Viscount Dunedin, Lord Shaw of Dunfermline, Lord Phillimore, and Lord Carson; Lord Blanesburgh dissenting.

Decision of the Court of Appeal [1928] 1 K. B. 523 affirmed.

APPEAL from a decision of the Court of Appeal affirming a judgment of the Divisional Court. (1)

By s. 46 of the Finance (1909–10) Act, 1910: "Where the licence holder is bound by any covenant, agreement, or undertaking, or is otherwise under any direct or indirect obligation of any kind, to obtain a supply of intoxicating liquor from any person or persons, the licence holder shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from or deduct from any sum due to any such person so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon, or in default of agreement determined by the Commissioners to be proportionate to any increased rent of the licensed premises, or increased prices of intoxicating liquor supplied, or other benefit obtained by such person by reason of any such covenant, agreement, undertaking, or obligation as aforesaid."

* *Present:* VISCOUNT DUNEDIN, LORD SHAW OF DUNFERMLINE, LORD PHILLIMORE, LORD CARSON, and LORD BLANESBURGH.

(1) [1928] 1 K. B. 523.

The question raised by this appeal was whether this section applied to tenancies entered into after the passing of the Act.

The appellant, Frederick Pedler, was the tenant and licensee of a fully licensed public-house known as the City Arms in the city of Gloucester.

He first became tenant of these premises under a lease granted by Arnold Perrett & Co., Ld., on August 31, 1911, for a term of one year from September 29, 1911, and so on from year to year, subject to determination by three months' notice. This lease contained covenants by the tenant to pay the excise duties for the licences and to deal exclusively with the landlords or their successors in business for any alcoholic liquors required for sale at the demised premises.

This lease was followed by a lease granted to the appellant on April 15, 1912, by a lease granted to the appellant and his wife, by reason of the appellant's absence on war service, on November 4, 1916, and by a lease granted to the appellant on March 5, 1920, that being the subsisting lease. All the leases were substantially in the same form, but differed as to the amount of the rent.

The landlords' business was acquired in 1924 by the respondents, the Cheltenham Original Brewery Company, Ld.

In January, 1926, the appellant applied to these respondents for an allowance in respect of the increased licence duty, but his application was refused.

On April 28, 1926, the appellant, by his solicitors, applied to the respondents, the Commissioners of Customs and Excise, under s. 46 of the Finance (1909–10) Act, 1910, to determine the proportion of the increased licence duty payable by him under the Act.

The Commissioners declined to entertain the application on the ground that they had been advised that the section did not apply to cases in which an agreement had been entered into since the passing of the Act.

The appellant having obtained an order nisi for a writ of mandamus directed to the Commissioners, commanding them to hear and determine his application for the apportionment of the increased licence duty, the Divisional Court by a

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majority (Avory and Talbot JJ.; Swift J. dissenting) discharged the order nisi. The Court of Appeal, by a majority (Lord Hanworth M.R. and Sargant L.J.; Scrutton L.J. dissenting), affirmed the decision of the Divisional Court.

The arguments used on the present appeal were substantially the same as in the Divisional Court and in the Court of Appeal, and they sufficiently appear from the judgments.

1928. May 3, 4. *Sir Henry Maddocks K.C.* and *Roland Burrows* for the appellant.

Sir Thomas Inskip A.-G., Sir F. Boyd Merriman S.-G. and *W. Bowstead* for the Commissioners.

Sir Reginald Mitchell Banks K.C. and *Croom-Johnson K.C.* for the landlords.

The House took time for consideration.

1928. July 18. VISCOUNT DUNEDIN. My Lords, this is an application for a mandamus against the Commissioners of Excise at the instance of one Pegler who is the appellant before your Lordships' House, and arises in the following circumstances.

Pegler is the tenant of a public-house, his landlords being the Cheltenham Brewery Company, who are associated with the Commissioners of Customs and Excise as respondents. His lease is a yearly lease and the date of the lease in question is March 5, 1920, and he is still holding under yearly prolongations thereof. His first connection with the premises was under a lease entered into on August 31 and running from September 29, 1911, for a year. Since then he has had various leases, in some of which his wife was associated with him. The covenants in the earlier leases were the same as those which I will now mention in the present lease. The covenants on which the present question arises are two in number. The first is: "And also that the Tenant will at his own expense apply for and use his best endeavours to obtain and maintain the necessary licences or renewal of licences for opening and keeping open the said premises during

the said tenancy as a Tavern or Public-house or Beer-house duly licensed for the sale and consumption therein of ale beer wine and spirits by retail or such of them as his licences entitle him to sell and will pay the excise duties for the said licences." The second is: "And also that the Tenant will deal exclusively and directly with the Landlords or their successors in business or nominees for any wines spirits cordials liqueurs ales beers porter stout and cider (whether in cask or bottle) cigars cigarettes and mineral or aerated waters which he may require for sale under the licence or licences attached to or held in respect of the said demised premises or under any occasional licence granted to him for sale elsewhere than upon the demised premises the purpose and intent being that draught ales stout and aerated waters sold by the Tenant shall be such as are brewed or manufactured by the Landlords and that the wines and spirits cordials liqueurs and other goods shall be of such description and quality as is usually supplied by the Landlords to their tied tenants and that in all cases the Landlords shall be at liberty if they think fit to select the same."

Pegler held a justices' licence and duly applied for and got an excise licence for the premises which he occupied under the lease of 1920. Up to 1926, he had paid the entire licence duty without claiming any repayment from the landlords although he seems to have mooted the question. But in 1926 he started the present proceeding. What that proceeding exactly is will now be explained.

Under the law as it stood up to 1910 certain duties were leviable. They were calculated on a sliding scale depending on the value of the licensed premises. Under the law as it then stood the duty on the premises in question if occupied as a public-house would have been 25*l.*, but in 1910 the Finance Act of that year imposed a new scale of duties and became the ruling Act for calculating the duty. Under this Act the duty for 1925–1926 was 35*l.* The 46th section of the Act of 1910 is as follows: [His Lordship read it.]

Pegler, conceiving that he had a right under this section, applied to the Commissioners to apportion the 10*l.* which he

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averred was the increase of duty on his licence occasioned by the Act of 1910. The Commissioners replied that the section only applied to agreements extant at the passing of the Act of 1910 and did not apply to an agreement contained in a lease of date 1925–26. Pegler then asked for a mandamus against the Commissioners. The case depended before a Divisional Court consisting of Swift, Talbot and Avory JJ. These two latter held that the Commissioners were right and dismissed the application. Swift J. dissented. Appeal was taken to the Court of Appeal, when the Master of the Rolls and Sargant L.J. agreed with the majority of the Divisional Court, Scrutton L.J. dissenting. Appeal has now been taken to your Lordships' House.

There is thus disclosed a decided divergence of judicial opinion. Nor is the matter made easier for those who have to say which opinion ought to prevail when they find that, if carefully analysed, neither do the opinions of the majority nor of the minority go on precisely the same grounds as between themselves. And before your Lordships, the learned Attorney-General produced at least one argument which I do not think had seen the light of day in the Courts below. This being so I have come to the conclusion, in the view I take of the case, that instead of proceeding to analyse all that has been said in the Courts below, I had better go straight to the words which go to the root of the matter and decide the case, as I think, in favour of the respondents. Before, however, I do so, I should just like to say that this case is not ruled by authority. To do them justice none of the learned judges who were of the opposing view held that it was so, but Scrutton L.J. has derived a little comfort from the fact that in the case of *Watney, Combe, Reid & Co.* v. *Berners* (1) Lord Haldane said that: "Under s. 46 of the Act of 1910, Saile, being bound by the tie to the appellants as to supply of liquor, could recover from them so much of the increase of his licence duty as was proportionate to the increased rent of the licensed premises, or the increased prices of intoxicating liquor supplied, or any other benefit obtained by them from

(1) [1915] A. C. 885, 889, 890.

the tie." The lease of Saile was of date January, 1911; the dictum would, therefore, cover the point now involved, but the case had to do, not with the Act of 1910 at all, but with the effect of s. 2 of the Act of 1912. Not only, therefore, is the dictum obiter, but there is no indication that the point to be taken as to s. 46, as to whether it applied to the agreements after its date, was in the learned Lord's view at all. The whole sentence is only an introduction to what follows as to s. 2 of the Act of 1912. While, therefore, I do not wish to rob Scrutton L.J. of such comfort as he finds, I cannot say that I have been for a moment hampered by anything said in that case.

My view on the words of the section is of the shortest. What is it that the tied tenant is entitled to recover or deduct, as the case may be? It is "so much of any increase of duty payable in respect of *his* licence occasioned by the Act." (The italics are mine.) There is here a comparison between something paid before and something payable now. In the case of a person holding under an agreement current at the time of the Act the contrast is obvious. So much was payable in respect of his licence before the Act, so much more is payable now because of the Act. But in the case of a man who only comes in after the Act—it may be years after, as in the case we are now dealing with, 1925–26—there is no increase payable in respect of the Act. There is no increase at all, because he never had a licence that paid a lesser duty than the duty settled by the ruling Act of 1910.

There is much controversy of opposing views in the Courts below as to the word "is" in the opening words of the section: "is bound by any covenant, agreement or undertaking," etc. And the minority argue that the view of the majority is only tenable if the words "at the time of the passing of the Act" are read into the section. My view escapes any such necessity. It is true that the agreement must be an agreement extant at the passing of the Act, but that is not because words are read in, but because the words as to the increase of duty payable in respect of his licence do not fit any agreement except an agreement extant at the passing of the Act.

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Sect. 2 of the Act of 1912 (2 & 3 Geo. 5, c. 8) was prayed in aid by both sides. It runs as follows : " Where the licensed premises are held under a lease or agreement for lease made before the passing of the Finance (1909–10) Act, 1910, which does not contain or import any covenant, agreement, or undertaking on the part of the lessee under such lease or agreement for lease to obtain a supply of intoxicating liquor from the grantor of the lease or agreement for lease, the lessee under such lease or agreement for lease shall be entitled, notwithstanding any agreement to the contrary, to recover as a debt due from, or deduct from any sum due to, the grantor of such lease or agreement for lease so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909–10) Act, 1910, as may be agreed upon as proportionate to any increased rent or premium payable in respect of the premises being let as licensed premises, and, in default of agreement, the amount proportionate to such increased rent or premium shall be determined in manner directed by rules of court by a county court in England or Ireland, and by a sheriff court in Scotland."

Those arguing for the appellant say that this shows that when the legislature dealing with such a subject wishes the enactment not to apply to agreements after the date of the Act, it says so in plain terms. Those arguing for the respondents say that, on their construction of s. 46, it makes a consistent and equal provision applying to both tied and untied houses ; while on the other construction in the future tied and untied houses will be in a different position. Now it is often argued when dealing with different sections of the same Act that if so and so had been meant, the draftsman would have expressed himself in one section as he had in another. But a parliamentary draftsman is not a being of immaterial conception, he is a mere mortal that varies from year to year, and to argue that because the draftsman of 1912 said so and so, the draftsman of 1910 would have said so and so, is, I think, to put too great a strain on the argument. The argument on the other side has a certain attraction, but on the whole I think the borrowed light of s. 2

of 1912 is not bright enough to illuminate s. 46 of 1910. I would only point out one little matter which I think escaped attention. The words in 1912 are *the* licence not *his* licence. To prevent argument it was well indeed to put in the opening words.

My Lords, in the judgments in this case, and still more in those of *Watney, Combe's* case (1), there were stern warnings to those who in order to read in words into a statute which are not there, or to divert words used from their ordinary and natural meaning, permitted themselves to speculate as to what the aim and attainment of the Act was likely to be. Your Lordships will have noticed that I have based my opinion on the words of the statute and on them alone, but with all deference to those opinions, with which indeed I cordially agree, I think it is quite legitimate when it comes to a question of construction without addition or diversion of words to see what the aim of the statute would turn out according to the one interpretation or the other.

Now in the view I have taken of the words the aim of the statute is simplicity itself. It finds a state of affairs where in tied houses the whole burden of the licence has been taken by the tenant or mortgagor, as the case may be. It then suddenly increases the duty and it thinks it not unfair that the new and unforeseen additions should be borne partly by both parties. "In spite of any agreement to the contrary" is necessary to get over an explicit clause such as we have here putting the whole burden on the licensee. That situation never occurs when agreements extant at the date of the statute are spent. Now take the other view. The other view is based on the idea that the brewer, who is landlord or mortgagee, has the whip hand of the licence holder, and that this clause is a charter for him. How futile this is! In the present case, and in a few more like it, he would indeed get a temporary relief; but what is the situation when a new lease has to be arranged? And most of the leases are yearly leases. Or when a new arrangement of the mortgage has to be fixed up, as a mortgage would ordinarily include a personal covenant to pay.

(1) [1915] A. C. 885.

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It was argued that all the brewer had to do was to arrange for an elusory apportionment, and to that the learned Attorney-General added the new argument that that was actually done by the licensee having signed a lease in which he said he would pay all the licence duties. My Lords, I will assume, and the assumption costs me no pain, that the new argument of the learned Attorney-General is unsound, and I will assume that an arrangement for an elusory proportion would not stand if challenged. What remains? All that the brewer, who ex hypothesi has the whip hand of the situation, needs to do is to say: "Arrange what proportion of the duty you like that I have to pay. You will always have that deduction, but then I will secure my own position either by enhancing the rent or stiffening the terms of the mortgage."

The words of the very learned judge, Parke B., in *In re Knight* (1), were quoted by the judges in the majority not so much as an authority that ruled this case, but rather as an illustration of Parliament doing the same sort of thing, and as a comment on the obvious justice of their view being adopted. It may interest counsel to know that there is another analogous case in the construction of a contract. It is a case which they could not possibly be expected to know or to find. I refer to the case of *Scott* v. *Edmond* (2) decided in 1850. In that case a superior in a charter of date 1789 bound himself to relieve his vassal from all public burdens and parochial burdens whatever imposed or to be imposed on the said lands except poors' money. Public burdens greatly increased in 1850. It was held unanimously by a Bench of thirteen judges that the obligation imported relief only from burdens imposed or to be imposed on the lands in question by virtue of the laws then existing, and not by virtue of subsequent laws. That case was upheld and applied by this House in 1878 in the case of *Dunbar's Trustees* v. *British Fisheries Society*. (3)

On the whole matter my opinion coincides with that of

(1) (1848) 1 Ex. 802. (2) (1850) 12 D. 1077.
(3) (1878) 3 App. Cas. 1298.

Sargant L.J., and I move that the appeal be dismissed with costs.

LORD SHAW OF DUNFERMLINE. My Lords, this is a case upon which I have had serious doubt. But ultimately I have found myself in agreement with the majority of your Lordships in the construction of s. 46 of the Finance Act, 1910. The section was in my view for the purpose of relieving tenants who found themselves by existing contracts under a burden which was not contemplated when they negotiated the terms of their tenancy. The language of the section shows very plainly the endeavour and the intention to prevent contracting out by the landlord-brewer from this liability in relief. This, however, is at once rendered really nugatory by the proviso that although contracting out of the whole provision of the section be forbidden, yet the parties may by agreement substantially destroy the prohibition by an arrangement which, while not formally getting rid of it entirely, would yet enable them to be rid of such a proportion of it as would only leave a fragmentary liability upon the brewer. Contracting out is thus shut out by the front door of prohibition, but immediately readmitted by the back door of the proviso.

What then is a Law Court to do? It can no more delete the proviso than it can the prohibition. Some reconciliation must be found.

I therefore feel more inclined to view the provision of the section as a transitory provision and covering a comparison between the taxation on the house prior to and that operative in the year of enactment. If there were, or be, any more extended policy meant to be effected, other language must be employed to express this meaning. But such matters are not for us but for the Legislature.

I agree with the judgment just pronounced by my noble and learned friend Lord Dunedin; but I refrain from expressing concurrence in regard to the Scotch case cited by the learned Viscount. If the soundness of that case came directly in question it would have to be investigated on its

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merits: in this case I think it unnecessary to express an opinion, one way or another, upon it.

LORD PHILLIMORE. My Lords, in the month of April, 1910, there was an occupant of the City Arms in the city of Gloucester who held the usual full licence for the sale of spirituous and other liquors and had paid for it when he took up its licence some time in the year previous (1909), the duty then payable by the holder of a licence for a public-house of the quality of the City Arms—namely, 25*l.* We may assume that he was a tenant from year to year and that he was what is called "tied," that is to say, bound by the covenants of his lease to take his liquors from his landlord on certain terms as to qualities and prices.

In April, 1910, the Finance (1909–10) Act, 1910, was passed, and by s. 43 of that Act certain duties being heavier than the previous rate of duties were charged retrospectively as well as prospectively "on any licences which shall have been granted after the 1st day of July 1909 or may hereafter be granted" with a rebate in the case of licences granted before September 30.

In the case of "tied" houses the brewer is a co-adventurer with the licensee, both standing to profit by the sale of drinks, and as there was to be an additional tax in respect of this profit, a tax which could not be escaped, because the licence had already been taken out, and which had not been foreseen when the landlord and tenant had entered into mutual relations by the lease, the Legislature proceeded to provide that the licensee, who had in the first instance to bear the burden, should have certain rights to claim a proportion of it from the landlord, and accordingly special provision was made for this by s. 46, which is as follows: [His Lordship read the section.]

We do not know what happened, but it may be presumed that the then licensee availed himself of this provision. The increase of duty in the case of the City Arms was at the moment from 25*l.* to 32*l.* 10*s.* In the course of the year 1910 the tenancy and the licence were renewed for another

year, and the licensee, whether he was the same person as in the previous year, we do not know, but whoever he was, knew when he took up his licence that he would have to pay 32*l.* 10*s.* and must have paid that sum. What were the relations with regard to this increase between him and his landlord, we do not know, nor is it material. But in the course of the following year 1911, the appellant Pegler became tenant and licensee. Under the terms of his lease he became tied to his landlord and he covenanted in the usual way to keep the premises as a licensed house to pay and discharge all taxes and duties and to endeavour to obtain and maintain the necessary licences or renewal of licences, and he paid, as he knew he would have to pay, the sum of 32*l.* 10*s.* for his annual licence. He remained licensee from that date till 1926, his lease and licence being annually renewed, and may for all your Lordships know, still be the tenant and licensee. This statement is subject to a qualification which is not material but should be stated for the purpose of accuracy, that during the time that he was serving in the war, his wife was named as joint tenant with him and was holder of the licence. During the time that he was so tenant the duty has varied, partly because of the change in the assessed value of the premises and partly by the operation of amending Finance Acts, the highest being the sum of 35*l.*, and the lowest 7*l.* 10*s.*

In 1926 he took up the position that he was entitled to the benefit of s. 46 and that the difference between 25*l.* and the excess figure, when there was an excess, ought to be borne as to some proportion of it by his landlord, and as the landlord refused to allow any deduction from his rent in respect of increased licence duty he made application to the Commissioners of Customs and Excise to determine a proportionate sum under the provisions of s. 46 of the Act of 1910, which has been already cited. The Commissioners replied that in their view s. 46 did not apply to cases in which an agreement had been entered into after the passing of the Act. Thereupon, the appellant applied for a writ of mandamus directing the Commissioners to determine the proportion of increased

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duty payable in respect of his licence. He obtained a rule nisi which after argument was discharged, the opinion of the majority of the judges in the King's Bench Division being adverse to him. He appealed to the Court of Appeal, where again there was a majority of two to one against him, and he is now before your Lordships' House.

My Lords, in my opinion the judgment appealed from is right and should stand. The Act of 1910 was, as its very title shows, an unusual Act. It imposed retrospective duties upon land values and it retrospectively increased duties upon property passing by death. It made retrospective increases of income tax and super tax, and, as already stated, licences for public-houses; and where, as in the case of licences, there would be one person to pay, and more than one who ought to share in bearing the increased tax, it was proper to provide a procedure by which the actual taxpayer could be relieved of a portion of his burden, and therefore it was enacted that notwithstanding any agreement to the contrary, that is, notwithstanding the usual agreement by which the licensee covenants to pay the licence duty, this unexpected increase should be shared. This in my judgment is the sole effect of this section, whether it be a case of landlord and tenant or of mortgagee and mortgagor. The latter relation having been referred to in the course of the argument, I would say that the same principle and the same provision apply.

A tenant comes and makes his bargain with a landlord. Part of that bargain is, that he who takes out the licence shall bear the duty. In ordinary cases it is known what the duty is. He has to pay it down when he takes up his licence, and the rent, or in the case of a mortgage, the provision as to interest is calculated accordingly. If the view of the appellant were to prevail, he might perchance snatch a year's proportion of duty from an unsuspecting landlord; but the next year, his rent would be increased in proportion. Possibly even if the law were as the appellant contends, provision might be made, quia timet as it were, in every lease by which the tenant would agree that he would not claim

a proportion, or that his proportion should be some minute part, say one per cent. of the increase of duty.

No man is bound to take a lease of a public-house unless he likes, and no landlord of a public-house is bound to take a tenant, unless he likes.

As far as I can gather, the reason which deterred Swift J. and Scrutton L.J. from coming to what I must, with all respect, characterize as the common sense and business conclusion of this matter, was that they felt it a duty to give a literal construction to the words of s. 46, to shut their eyes to the general tenor of the statute, and to apply themselves to the words of the section only; and in so doing, they came to the conclusion that the contention of the Commissioners and of the landlord required the insertion of words which were not to be found in the Act, and which therefore ought not to be inserted.

My Lords, I think that one ought to look at the whole Act, and I am rather inclined to quote against the dissentient judges the maxim "qui haeret in litera haeret in cortice." But in truth I can take them upon their own ground, and I find in the section itself quite sufficient indication that it was only intended to provide for the case of holders of annual licences who had already paid for their licence, and whose term was still running.

The licence holder, so the section says, may recover or deduct from any sum he has to pay "so much of any increase of the duty payable in respect of his licence occasioned by this Act as . . . ." What is "his licence"? It is not the licence of the City Arms. Such places, it is true, are called "licensed premises." But the landlord cannot have the premises licensed, nor can he claim as a right to put in whom he pleases, and thereby confer a licence on that man. The licence holder is some person approved by the justices, though no doubt he is not licensed in the air but licensed to sell in the particular place which for that reason is called "licensed premises."

For a man in the possession of a licence in April, 1910, which had been already current perhaps for more than half a year,

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there was an increase of duty payable in respect of his licence. But for a licensee after the date of the passing of the Act of 1910, there was no increase of duty in respect of his licence. It was no concern of the appellant Pegler what somebody had paid for a licence two years before. Indeed it might be said that it was only by accident or by inference that he knew or could tell what that predecessor had paid. There was no statutory method of discovery.

It was suggested in the course of the argument for the appellant that if a licensee who held his licence in April, 1910, and was therefore entitled to the benefit of s. 46 for that year continued to be the licensee in following years he would continue to receive the benefit of a proportion of the duty; and upon this suggestion an argument was based to the effect that the words "his licence" in the section must mean more than the current licence for the one year.

My Lords, if that case were to come before us, I should require to examine closely into the position of a licensee under the general licensing law. It might possibly be that the right of a man of good character residing in the approved house to a renewal of his annual licence is so strong that he ought to be treated as a continuous licensee, so that if the landlord did not intend to contribute towards the duty in future, he would have to make some special bargain to protect himself. But prima facie I should be disposed to hold that "his licence" meant the actual existing authoritative document which enabled that man to carry on that public-house for that year, and that the words would have no application to a future document.

My Lords, other arguments of weight deduced from the language of the section were offered on behalf of the respondents; but I think that I have said enough. In my opinion the appeal should be dismissed.

LORD CARSON (read by VISCOUNT DUNEDIN). My Lords, in the present case we are not dealing with the case of a licensee who before or at the time of the passing of the Finance Act (1909–10) had held a licence for the supply of alcoholic

liquor at the City Arms Inn or of an assignee of such premises as licensed premises. In my opinion in such cases different questions might have to be considered having regard to the nature of a licence as property under the existing laws. It is admitted that prior to the year 1911 the appellant had not held any licence and that his title originally commenced under a demise of premises for one year from September 29, 1911, and so on from year to year subject to determination by notice as therein provided. It is evident, therefore, that the appellant was in an entirely different position from licensees of tied houses who were in possession at the time of the passing of the said Act and who but for the relief granted by s. 46 of the Act would have been liable to pay the whole of the extra duty imposed by the Act of 1910 and in accordance with the covenants contained in the demise. There was in such cases an ample subject-matter to which the section could be applied to arrange the proportion of liability for new duties under circumstances which could not have been contemplated when the contract was entered into between the parties. The difficulty however is created by the opening words of s. 46 which enacts that " where the licence holder is bound by any covenant agreement or undertaking or is otherwise under any obligation of any kind to obtain a supply of intoxicating liquor for any person or persons the licence holder shall be entitled, etc." Now it cannot be denied that the appellant comes within the words quoted, and I agree with a great deal that has been said by Scrutton L.J. as to the necessity of construing the words as passed by Parliament without guessing or trying to infer that something different was intended. But when I come to examine the position of a licence holder created after the passing of the Act and bound by covenants in a demise created after the Act the real difficulty arises from the words in the section defining the relief granted, for what I have to arrive at is " so much of any increase of the duty payable in respect of his licence occasioned by this Act as may be agreed upon or in default of agreement to be determined by the Commissioners to be proportionate to any increased

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rent of the licensed premises or increased prices of intoxicating liquor supplied or other benefit obtained by such person by reason of any such covenant agreement undertaking or obligation as aforesaid." Now in the first place I have to make a comparison of the increase of duty payable in respect of his licence with that previously paid before the passing of the Act and, so far as I can see, one of the elements of comparison is non-existent. I do not myself think the use of the words "his licence" instead of "the" licence would make any difference in such a case as we have to determine. But then, in the absence of agreement, the Commissioners have to proceed to examine into increased rents and prices and other benefits coming out of the covenants or agreements. In my view such an inquiry is entirely inappropriate if not impracticable in regard to a demise of licensed premises made after the Act. The contracting parties are well aware not only of the increased duties imposed by the Act of 1909–10 but the other elements for consideration to which I refer must be materially affected and duly weighed having regard to the agreement of the tenant to pay such duties. I do not know, if such an inquiry as is asked for by the appellant was to take place, how far the Commissioners would be entitled to hear evidence from the landlord or the tenant respectively as to the various elements which were considered or entertained in fixing the rent or the prices of intoxicating liquors supplied or other benefits as mentioned in the section, and how far such considerations would modify or annul the right of relief claimed by the appellant.

I am of opinion therefore that, although the opening words of the section may be wide enough to cover the present case, there is sufficient in the subsequent part of the section and in the working out of the relief under the terms of the section to indicate that the section has no application to tenancies created after the Act came into force. I agree with the noble and learned Viscount on the Woolsack that this appeal should be dismissed with costs.

LORD BLANESBURGH (read by LORD ATKIN). My Lords, the true place and purpose of s. 46 in the scheme of Part II.

of the Finance (1909–10) Act, 1910, is the fundamental issue on this appeal. Is the section one of inappreciable or transitory importance, confined to ties or to licence holders in being at the passing or commencement of the Act, and, as has now been suggested, possibly affecting them only till the end of the licensing year then current? Or is the section one of fundamental significance, operative for the whole duration of the Act to adjust compulsorily as between a licence holder and his brewer—if I may for brevity adopt this term to describe the person entitled to the benefit of a tie—the burden of an abnormal additional tax on licences imposed by the Act for the first time? Swift J. in the Divisional Court, and Scrutton L.J. in the Court of Appeal, take this latter view of the section and decide the case in the appellant's favour, and although I am very conscious of the weight of your Lordships' contrary opinion I remain constrained to say that I agree with them.

The appellant certainly starts with certain initial advantages. This House in *Watney* (1) clearly I think acquiesced in Lord Haldane's statement there definitely made, that a person in his position was under the section entitled to call upon his brewer for contribution to the increased duty. The case cannot, I know, be claimed as a binding authority to the full extent necessary now, because that question the House was not then called upon to decide; but the interpretation of the section by their Lordships and in particular by Lord Wrenbury in a sense entirely favourable to the appellant's present contention cannot I feel be lightly set aside.

Further the Licensing Act, 1904—a statute for present purposes entirely in pari materia—supplies a statutory precedent for the appellant's view of the section. With that Act the well known compensation levy originated. The levy was called a charge, and in relation to it s. 2, sub-s. 2, provided that the deductions from rent there specified "may, notwithstanding any agreement to the contrary be made by any licence holder who pays a charge under this section."

(1) [1915] A. C. 885, 898.

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On these words it was held in 1909 in *Wooler* v. *North Eastern Breweries* (1) that, as is now contended by the appellant on the present section, the words "notwithstanding any agreement to the contrary" included agreements made after as well as before the passing of the Act. Every contention against that construction which has been urged now was, and with certainly no less reason, put forward then; but without success. In giving judgment Phillimore J. used words which are very apposite on the present occasion. "I agree," he said, "that the words of the section can be satisfied by making them apply only to contracts existing at the date of the Act, and if there were any reason aliunde for doing so I should be prepared so to apply them. That is practically what Parke B. said in *In re Knight.* (2) But that means that I should be putting a restricted construction on the words because it was necessary to make them fit with other portions of the Act. Prima facie the words refer to any agreement which is in existence at the time when the deduction is sought to be made and, as I can find no other portion of the Act requiring a restricted construction I must treat them as applying to agreements made after the passing of the Act as well as to agreements made before it."

And this judgment is the more unquestionable, from the fact that it may be taken subsequently to have received legislative approval. For s. 2, sub-s. 2, of the Act of 1904 was repealed and without alteration re-enacted by s. 21, sub-s. 3, of the Licensing Consolidation Act, 1910.

To these two matters I must later return, and further indications in support of the appellant's view of the section will emerge in the sequel upon a consideration of the actual terms of the section. To that I now proceed, interposing only, in order to facilitate their correct interpretation, some reference to the nature of the increase in the licence duties effected by the Act and to the terminology in which that increase is there described.

The charging statute which in respect of licence duty the Act of 1910 displaced was the Inland Revenue Act, 1880.

(1) [1910] 1 K. B. 247, 252. (2) 1 Ex. 802.

The maximum duty thereby charged in respect of any excise licence for the sale of liquor was no more than 60*l.* Up to that limit the duty was charged with general reference to the annual value of the premises in respect of which the licence was granted, but, so far as concerned houses of value over 50*l.*, always in very much smaller proportions than that which became the fixed proportion under the Act of 1910. At an annual value of 700*l.* the duty of 60*l.* was reached. There it remained, a maximum, unaffected by higher values. By this 1910 Act the duty became half the annual value of the premises whatever that value might be. The result, especially in the case of licences granted in respect of important premises, was, like other new imposts made by the same statute, to say the least, arresting. In the case of premises above 50*l.*, the new licence duties must always be in excess, in the case of premises reaching 600*l.* they must always be as much as ten times in excess, and in the case of premises of still higher annual value they must be to an extent with no limit of amount, in excess of the duties theretofore chargeable. The duty on a licence which under the Act of 1880 could never exceed 60*l.* might, under the new Act, overtop that sum by many hundreds, even by thousands of pounds—by sums, indeed, out of all proportion and in quite another order to the displaced maximum.

And so entire an entity is this increase of duty that by the Act it is treated as a thing apart from the original duty, a separate item to which separate incidents may be, as they are, attached. Under the Act the aggregate licence duty imposed is analysed as being made up (*a*) of the duty which would have been charged if the Act had not passed and (*b*) of the increase in that duty by the Act effected. That increase, it must never be forgotten, is not an increase upon some duty actually charged before the Act on a particular licence in respect of particular premises. It is an increase, not actual but hypothetical, upon the duty which upon the licence now granted in respect of any premises would under the old Act in the year of charge have been payable if the new Act had not been passed. Accordingly it is as an

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"increase" as appropriate to the duty on a licence granted for the first time after the Act, as to one which is merely a renewal of a licence that had long existed. The "increase" spoken of being always hypothetical is as definite a thing, as easily ascertainable, as completely appropriate to an entirely new licence as to any other. And in precise correspondence the duty under the old Act is the sum which "would have been payable if this Act had not passed" a hypothetical not an actual thing.

Now it is with the "increased" duty as so defined that s. 46 is solely concerned. With "the sum which would have been payable if the Act had not passed" the section has nothing to do. The licence holder had under the Act of 1880 alone been liable for this sum. The section leaves him as before finally liable for it. The contribution required from the brewer under the section is only to be one towards "the increase in the duty on the licence under this Act." Here will, as I think, be found the guide to the true interpretation of s. 46, if it be not indeed the key to its necessary construction.

And of no less importance is it in construing the section to ascertain and to bear in mind the date when this increase first became operative. As to this, the position is that, although the Act was not passed until April 29, 1910, the increased licence duties were imposed as from October 1, 1909. They were, in the words of s. 43, as from that date charged "on any licence granted after 1st July, 1909, or which may hereafter be granted." This fact will in the construction of s. 46 be found to have what may prove to be decisive significance, for from it flows the consequence that the date of the passing of the Act is, in relation to the apportionment made by that section, no starting point for anything. Accordingly interpretations of the section which treat the whole arrangement thereby enacted as being pivoted on a date which s. 43 makes of no significance are at once discounted if they are not entirely destroyed.

It has now been mooted that s. 46 found its place in the statute mainly that by it the position as between the licence

holder and the brewer might be adjusted in respect of that long antecedent period, so that its operation was really spent with the expiration of the licensing year current at its passing. I therefore thought it right for my own satisfaction to examine the Finance Bill of 1909–10, as presented to this House in 1909 and then rejected, in order to see whether s. 46 had any counterpart in that Bill. And it may now be conveniently stated that its ss. 43–47 are in terms identical with those same sections of the present Act. In other words if the Finance Bill of 1909 had in ordinary course been duly passed in 1909 in the form in which it left the House of Commons it would have presented in relation to s. 46 precisely the same problem that that section presents to your Lordships now.

I proceed to a closer examination of the section itself with these preliminary observations in mind. I need not set it out again at length. It must, I think, be agreed that at first sight, at all events, its meaning seems clear enough. The section is apportioning the increased duty which I have described, between licence holder and brewer on the footing that the licence holder who, as between himself and the revenue is alone liable for the duty, has on an occasion paid the whole of it. On that basis the section provides that irrespective of any agreement to the contrary in the arrangement relating to the tie the brewer shall repay to the licence holder that proportion of the increase in the duty mentioned in the section, which in turn is to be determined by the Commissioners in default of an agreement between the licence holder and the brewer being reached as to its proper rate. The proportion repayable by the brewer being fixed by reference to the benefit accruing or estimated to accrue to him from the tie, it is a proportion which, properly ascertained, may vary from year to year and to a degree in no correspondence whatever with any variation in the increased duty, which depends solely on some change in the annual value of the licensed premises. Accordingly the section seems to contemplate the ascertainment of the proportion with each payment of increased duty, and points to the

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licence holder entitled to the benefit of the section being he who when his liability to pay any increased duty arises is under a tie to the brewer. "Where the licence holder is bound by any covenant . . . . he shall be entitled to recover." These words in the present tense followed by a consequence expressed in the future are, I think, in this connection very striking. The grammatical turn is apparently a favourite with the draftsman of this Act. See as other examples ss. 6, 8, sub-s. 3; ss. 11, 21, sub-s. 1; and s. 31, sub-s. 1. In my judgment, it conveys that the licence holder is to be one answering the description at the moment when on any occasion he pays the increased duty, just as the later words "subject to any agreement to the contrary" refer to any agreement in existence at the same moment and the expression "his licence" merely means—and for this I claim the authority of Lord Sumner in *Watney's* case (1)—"the licence held by the party entitled to recover." In short these introductory words supported by the rest of the section bring the whole within the principle of cases like *In re Stevens* (2); *In re School Board Election for the Parish of Pulborough* (3), to which Scrutton L.J. refers in his judgment.

My Lords, that statement of the section, commenced as a description of its natural effect is, I submit, for the reasons which I have added to it, a statement also of its true result. But, as such, it has, on quite divergent grounds, failed to find acceptance in many quarters. The whole effect of the section, for instance, in Talbot J.'s view is determined by its preliminary words "where the licence holder is bound." These words, he says, are ambiguous. They may mean "is hereafter bound or bound now, that is *at the passing of the Act* (the italics are mine) . . . . or is bound at any future time." And he holds that the words in their context have the first meaning. They cannot therefore apply to a licence holder like the appellant who was not tied at the passing of the Act. Here the learned judge does not seem to have observed that, as above appears, the date of the passing of

(1) [1914] 3 K. B. 288, 295. (2) (1882) 20 Ch. D. 697.
(3) [1894] 1 Q. B. 725.

the Act is a date, in relation to this section of no relevance or significance whatever. If the section had been intended to be limited, as he has held it to be, these introductory words instead of being what they are must surely have been "where the licence holder was at the commencement of this part of this Act bound"—a meaning that can by no process of legitimate construction be attributed to the words actually employed. The truth is that, if s. 43 has due effect given it, there is in these introductory words no ambiguity at all. They cannot, as a matter of good sense, be held to mean "is bound now"; and their prima facie meaning "is bound when any liability for increased duty arises" remains their only sensible meaning, just as the following words "notwithstanding any agreement to the contrary" naturally refer, as was pointed out in *Wooler* (1), to any agreement which is in existence at the same moment. Talbot J., who was apparently in complete agreement with *Wooler* (1) as to the meaning of these latter words, stated in terms that he could not and did not rely on them for his conclusion. On the other hand it was apparently largely on these very words that the Master of the Rolls based the same conclusion, being himself unimpressed with any significance in the introductory words.

Differing, for reasons given, with both views and merely noting that Avory J. was, I think, in general accord with Talbot J., I pass to the view of the section taken by Sargant L.J., and adopted, as it seemed, on behalf of the Commissioners at your Lordships' Bar.

According to the learned Lord Justice the section is dealing only with a tie existing at the passing of the Act. With reference to such an existing tie the licence holder may, the section assumes, have bound himself by agreement to pay all duties on his licence. That is the state of things to which the section is addressed. The agreement to the contrary is to go for nothing, but whether there has previously been agreement or none until the parties agree otherwise—and the section leaves them at perfect liberty so to do, if they like

(1) [1910] 1 K. B. 247.

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—the increased duty is to be apportioned between them by the Commissioners in the manner prescribed by the section. And that is all.

The first observation to be made with reference to all this is that the Lord Justice reduces the impressive words "notwithstanding any agreement to the contrary" to complete sterility. According to him the section goes on to enable the parties notwithstanding to agree to anything they like and thus to make the section so far as they are concerned completely inoperative.

On this view certainly the enactment is a very little thing. But can it be justified? I think not. In reaching his conclusion the learned Lord Justice seems to me to fly in the face of the rules of grammar. Only by doing so is he able to affirm that by the words "as may be agreed upon" the section reserves to the licence holder and the brewer power to agree that its provisions shall have no application to them. But these words have grammatically no such effect. It is only as to the actual proportion of the duty payable by the brewer that the licence holder and he are by them permitted to agree. Grammatically the question is, whether the words "to be proportionate to any increased rent" are dependent not only upon the words "determined by the Commissioners" but also upon the words "agreed upon." And the answer must be in the affirmative when it is observed that the immediate antecedent "determined," etc., is not complete in itself, but has to be referred back to and brought along with the preceding subjunctive "may be." The words are "as may be agreed upon or in default of agreement determined": they are not "as may be agreed upon or in default of agreement *may be* determined," a variant which might well have on this point produced the opposite result. As the words stand, the two branches must be brought forward together: the second is not sufficiently complete to come forward of itself: with the result that the agreement of the parties like the determination of the Commissioners is confined to the fixing of the proportions.

But this conclusion need not be rested on considerations which to some minds may savour of pedantry. Carry on to this point the most instructive comparison of the two sections made by Lord Sumner in *Watney* (1), and compare in this connection with those of s. 46 the provisions of s. 2 of the Act of 1912 so much referred to at the Bar. That section it will be recalled provides that "the lessee . . . . shall be entitled notwithstanding any agreement to the contrary to recover as a debt . . . . so much of any increase of the duty payable in respect of the licence under the provisions of the Finance (1909–10) Act, 1910, *as may be agreed upon as proportionate to any increased rent* . . . . and in default of agreement the amount proportionate . . . . shall be determined . . . . by a County Court." Now there, more conveniently perhaps because another authority is substituted in place of the Commissioners, the order is transposed. But can it be doubted when the two sections are placed alongside of each other that the effect of both in this matter is and is intended to be the same? The only difference, if it be a difference, is that in the later section the result by reason of the arrangement chosen is reached without calling in aid the rules of grammar.

And, this construction does leave the parties free to agree a great deal. In a case submitted to them the Commissioners might quite well find that no benefit had accrued to the brewer from the tie. In such a case there would under the section be no contribution from the brewer. And that which the Commissioners might find the licence holder may, without going to the Commissioners, agree with the brewer. The agreement would be that there was no such benefit and it would be valid. But such an agreement must be reached in every year, and an agreement in advance that whatever in any year the benefit of the tie to him the brewer was to make either no contribution to the increased duty or an illusory contribution would in my judgment be a void agreement, and the section seems to me to intend that it should be.

(1) [1914] 3 K. B. 288, 295.

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With the greatest respect therefore to the learned judges whose opinions I have now examined, I cannot think that the natural interpretation of the section is displaced by anything they have said.

As to the Commissioners' views, their original contention was that the section could never apply to any tie non-existing when the Act became law and created only after it was passed. And this in result was the view which was apparently accepted by the four learned judges to whom I have just referred. But when he was asked what was the effect of the section in a case where the licence holder, owner in fee of his licensed house at the commencement of the Act, mortgages to the brewer his house and licence after its passing and ties it to the brewer by one of his mortgagor covenants, the Attorney-General, on behalf of the Commissioners, while seeking, I believe all your Lordships thought unsuccessfully, to neutralize the concession in another way, was constrained ultimately to admit that such a licence holder was within the Act.

My Lords, he could not, I think, help himself. The case supposed can only be excluded from the Act by reading into the section after the words "is bound" the words "at the passing of this Act," and I have, as I hope, already shown how impossible it is in this section to do anything of the kind.

The importance, however, of the admission in relation to the final question now to be considered will not be overlooked. It shows that in the very numerous cases which the concession covers, the section is not, any more than was s. 2, sub-s. 2, of the Act of 1904, to be treated as inapplicable to future ties on any supposed ground that it would be futile of effect if it was.

And this brings me to the immediate question on this appeal. Even if the section covers a tie subsequent to the commencement of the Act, does it extend to a licence holder who, like the appellant, was one for the first time after the Act became operative? Is the section confined to a licence holder who was such before the Act and so continued to

the year of charge? The only grounds for saying that, extending to future ties, the section is confined to existing licence holders, is that there cannot in the case of a new licence holder be properly any "increased" duty upon "his" licence. My Lords, the answer to this difficulty will be found, I hope, in the earlier part of this judgment. Whatever might have to be the construction in the general case, I hope I have there established that an "increased" duty is in this Act as applicable to a new licence as to the renewal of an old one. And with reference to the expression "his licence" I am fortified not only by the view just expressed by my noble and learned friend Lord Carson but by the authority of Lord Sumner in the passage already taken from his judgment in *Watney* in the Court of Appeal (1), where dealing with the words "in respect of his licence" he said, "that is of the licence held by the party entitled to recover." My Lords, with that statement before me I have the greater confidence in expressing the view, already in this judgment adumbrated, that the ambit of the clause gathered from its earlier provisions is in no way subsequently restricted either by the word "increased" or by the expression "his licence" subsequently found in it.

There remains for consideration the view suggested by my noble and learned friend Lord Phillimore that the section has direct reference to the period between October 1, 1909, and the passing of the Act with no operation since the expiration of the licence year then current.

Now even the Commissioners have always acted on the assumption that the section still applies to ties existing at its date, and in view of the fact that the Act covers, as it certainly does, "new licences" under the Act of 1904—see s. 47—which may continue without renewal for seven years, and that the relevant ss. 43–46 appear in their present form in the Finance Bill of 1909, perhaps my noble friend may hesitate to advise your Lordships to adopt a view of the section at once so novel and so far reaching in its consequences. In any case I cannot myself, for reasons already given, adopt it,

(1) [1914] 3 K. B. 295.

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and thus am I led to the conclusion that the appellant here is within the benefit of the section. In my view a critical examination of its terms merely serves to confirm the correctness of the conclusion, reached on a general view of its provisions, and is effective to reinforce the accuracy of the statement of Lord Wrenbury of its purpose and effect already alluded to.

There are two criticisms of a general character to which I would now briefly refer. The first is that the view of the section I have felt constrained to take involves a legislative interference with freedom of contract not to be presumed. I doubt whether this criticism is ever really formidable at this time of day. It certainly loses force with the progress of the years. Moreover, this very interference was in analogous circumstances and by identical words introduced in the Finance Act, 1904, to which reference has so often been made. Nor is the principle "noscitur a sociis" far away. In a section which on any view of it involves a statutory interference with existing contractual rights, an interference with freedom of contract in respect of the same matter in the future is relatively a very little thing.

The second criticism is that this construction of the section is really fruitless of result because its effect, even if applicable to then existing ties for their entire duration, can always on the adjustment of a new tie be evaded by requiring as an equivalent to the brewer's statutory burden either a reduction of discounts or an increase in prices of goods supplied or in the rent of the house or in the interest on the loan, as the case may be.

My Lords, the brewer would, I suspect, in the great majority of cases, find this a very insecure prop to lean upon, and the action of the respondent company here, insisting, as they have done all through, upon a separate right of audience, is eloquent upon the point. It has not been to meet the financially trivial demand of a mere yearly tenant like the appellant that they have come so far as your Lordships' House. They are here for a much more vital reason, not difficult I think to conjecture. Tied prices and discounts are, I

suspect, in very many instances well nigh as competitive, if at a higher rate, as free prices and discounts. Neither excessive rents nor excessive interest can be obtained from good tenants or mortgagors. An increase of rent too would quickly be reflected in an increase of duty; a proportion of which, on the present hypothesis, will as such be borne by the brewer. Most important, however, of all is the consideration that an agreement purporting to fix in advance the brewer's annual contribution, a thing, prophetically, quite unascertainable, would be in constant peril of being ignored as a mere attempt at evasion of the statutory prohibition. See on this subject *Lord Ludlow* v. *Pike*. (1) As I have already indicated, the reasoning on this very point of my noble friend opposite in *Wooler* (2) applies, as I think, to this statute with even greater cogency than it did to the section there in question.

At the outset I ventured to observe that further considerations in support of the view I have taken of the section would emerge as we proceeded. I hope that these are now sufficiently apparent. They are both negative and positive. They are negative in this that all the alternative views (if we exclude that of Sargant L.J., which would reduce the section to sterility and is, I submit, demonstrably a mistaken view), diverse as they are both as to their basis and effect, have this common difficulty to overcome that no adequate or even plausible explanation has, so far as I can recall, been given of the action thereby imputed to the Legislature in permitting the licence holder and the brewer by agreement to adjust the incidence of the new duty in the future while prohibiting them from doing so in the present. And the considerations are positive, in this, that the view of the section which I have ventured to indorse is based upon a meaning of its words, natural according to the terminology of the Act, embodying a principle not for the first time applied by the Legislature to burdens upon licences, and, withal, so comprehensive that by reference to it every case that can arise under the section is at once determined with consistency and completeness.

(1) [1904] 1 K. B. 531. (2) [1910] 1 K. B. 247.

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Nor is the justification for the section according to this construction of it far to seek. It embodies a policy which, although politically it may be a subject of keen controversy, is simple of statement. This is one of the new imposts made by the Act—one, in the case of valuable licensed premises, quite indefinite in amount. By the Act the impost is thrown —presumably it had to be thrown, as the licence duty had always been thrown—exclusively upon the licence holder. But the concern of s. 46 is to provide that it shall not always to its full extent remain finally his burden, in, at all events, one case where the advantages of the licence are shared with another. Accordingly the section provides that where the licence holder is tied to a brewer who takes, as a consequence of the tie, an extra benefit, which, if not so taken, would have remained with the licence holder as an increase on the profit made or a reduction of the loss incurred in carrying on his business, the brewer, who is thus through the tie benefiting from the business carried on in the house, shall, agreement or no agreement to the contrary, contribute in relief of the licence holder a proportion of the new impost measured by that benefit. It is because the increase is really a new burden that it alone is so shared. The section may be crude in conception and troublesome to work out, but if it is permissible judicially to recall assertions current in 1910 as to the share of the good things of life pertaining to the tied house brewer, one need feel no surprise that in a revenue Act of that day he was made the subject of Treasury attention for a period of indefinite duration.

The support lent by the Commissioners to the brewer's views in this case must be attributable to the burden of the references being greater than was contemplated and by their desire, in consequence, to reduce them in number as much as is possible. To my mind that is not a consideration to which any Court of construction may have regard. It is for the Legislature to retrace its steps if it has gone too far: it is not for the Courts to limit statutory privileges merely in order that responsibilities which Parliament has imposed may thereby be reduced.

In my judgment this appeal should be allowed and the cause remitted to the King's Bench Division with a direction to make the rule absolute.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Lords' Journals, July 18, 1928.

Solicitors for the appellant: *Maitland, Peckham & Co.*

Solicitor for the first respondents: *Solicitor for Customs and Excise.*

Solicitors for the second respondents: *Godden, Holme & Ward, for Haddock & Pruen, Cheltenham.*

[HOUSE OF LORDS.]

ENGELKE . . . . . APPELLANT;

AND

MUSMANN . . . . . RESPONDENT.

H. L. (E.)* 1928 *July* 18.

International Law—Diplomatic Privilege—Immunity from judicial Process—Official at Embassy—Consular Secretary—Statement by Attorney-General on Behalf of Foreign Office—Whether conclusive—Affidavit of Defendant as to Grounds of Immunity—Right of Plaintiff to cross-examine.

A statement made to the Court by the Attorney-General on the instructions of the Foreign Office as to the status of a person claiming immunity from judicial process on the ground of diplomatic privilege, whether as ambassador or as a member of the ambassador's staff, is conclusive.

Duff Development Co. v. *Kelantan Government* [1924] A. C. 797 applied.

The defendant in an action in the King's Bench Division for arrears of rent took out a summons to set aside the writ on the ground that he was a member of the staff of the German Embassy and filed two affidavits in support of his application. The plaintiff applied for leave to cross-examine the defendant upon his affidavits. Shearman J. ordered the defendant to attend for cross-examination, but gave leave to appeal. Upon the appeal the Attorney-General attended at the request of the Foreign Office, and on the invitation of the Court informed them that the defendant had been appointed a member of the staff of the German Ambassador under the style of Consular Secretary, and had been

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* *Present:* LORD BUCKMASTER, VISCOUNT DUNEDIN, LORD PHILLIMORE LORD BLANESBURGH, and LORD WARRINGTON OF CLYFFE.

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received in that capacity by the British Government. The Court of Appeal, by a majority, declined to accept this statement as binding and affirmed the order for cross-examination :—

Held, that the statement of the Attorney-General was binding on the Court, and that the defendant was therefore entitled to diplomatic privilege.

Per Viscount Dunedin. Apart from that statement, the order for the cross-examination of the defendant would have been justified.

Decision of the Court of Appeal [1928] 1 K. B. 90 reversed.

APPEAL from an order of the Court of Appeal (1) affirming an order of Shearman J. in chambers.

The material facts may be shortly stated as follows :—

The respondent issued a writ in the King's Bench Division against the appellant for payment of arrears of rent and dilapidations under a lease of a house in Hampstead. The appellant entered a conditional appearance and took out a summons to set aside the writ on the ground that he was in the service of the Ambassador of the German Empire. In support of his claim the appellant filed two affidavits to the following effect. He entered upon his duties on the staff of the German Embassy in London on November 25, 1920, and had been exclusively employed as a member of the Ambassador's staff ever since. He was employed in the commercial department of the Embassy, and in 1923 was promoted to the post of Consular Secretary. The duties which before the war were undertaken by a consul or consul-general were now in all towns where a German Ambassador was appointed performed by that Ambassador, and the appellant assisted in carrying out the duties of the Ambassador in that regard. Further, he was from time to time employed in the general duties of the Embassy, such as the coding and decoding of telegrams. His appointment as a member of the Embassy staff was notified to the British Foreign Office on November 30, 1920, by a letter of that date, and his name was on the Diplomatic List issued by the British Foreign Office. The respondent asked leave to cross-examine the appellant on his affidavits and filed an affidavit stating that to the best of his knowledge, information, and belief

(1) [1928] 1 K. B. 90.

the appellant was a member of the consular staff and not of the diplomatic staff.

The Master refused leave to cross-examine the appellant, but Shearman J., in chambers, reversed the order of the Master and ordered that the appellant should attend for cross-examination, but gave leave to appeal.

On the hearing of the appeal the Attorney-General attended to give information to the Court if so required. At their invitation he informed the Court, on the instructions of the Secretary of State for Foreign Affairs, that the defendant had been appointed a member of the staff of the German Ambassador under the style of Consular Secretary, and that his position as a member of the Embassy was and had been since his appointment in 1920 recognized by the British Government without reservation or condition of any sort.

The Attorney-General's statement is given in full in the opinion of Lord Buckmaster.

The Court of Appeal by a majority (Scrutton and Sargant L.JJ., Lord Hanworth M.R. dissenting) affirmed the decision of the learned judge.

Scrutton L.J., in whose judgment Sargant L.J. concurred, declined to accept the Attorney-General's statement as conclusive, as that would be to substitute a department of the Government for the Courts in a class of case where such substitution had never hitherto been recognized. In his opinion the question of immunity should only be decided after the relevant facts had been ascertained in the usual way, and the cross-examination of the appellant was necessary for that end.

The Attorney-General obtained leave to intervene in the appeal to this House on the ground that the issues raised in these proceedings might affect the interests of His Majesty in the conduct of foreign affairs and his relations with foreign States. The contentions of the Attorney-General were set out in the following paragraphs of his case :—

" 26. The Attorney-General submits that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs and his relations with foreign States and their

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representatives to accord or to refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. For this purpose a list of the members of his diplomatic staff is furnished from time to time to the Secretary of State by every foreign ambassador. This list is not accepted as of course on behalf of His Majesty, and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt or because the number of persons for whom that status is claimed appears to the Secretary of State to be excessive. The list prepared by the Secretary of State and forwarded by him to the sheriffs for the purposes of the statute of Anne, while it is based upon the list furnished in the first instance by the ambassador, is not therefore necessarily identical with it. The sheriffs' list, however, is not itself conclusive evidence in a court of law on the question of diplomatic status, since it is plain that changes may have occurred in the personnel of the ambassador's staff since the list was prepared with the result that persons whose names appear in it may have ceased to be members of the staff and others whose diplomatic status is undoubted may not yet have been included in it.

" 27. Since therefore it is for His Majesty alone, acting on the advice of His Secretary of State for Foreign Affairs, either to accord or refuse recognition to any particular person as a member of the diplomatic staff of a foreign ambassador, the Attorney-General submits that a statement that recognition has been accorded made on behalf of His Majesty either by the Secretary of State or by H.M. Attorney-General in person must necessarily be conclusive of the diplomatic status of that person. It is admitted, however, that such a statement is conclusive upon the question of diplomatic status alone ; and it is still for the Court to determine as a matter of law whether, the diplomatic status having been conclusively proved, immunity from process necessarily follows. The Attorney-General desires to point out that there may be cases in which, though the diplomatic status is conclusively proved in the

manner indicated, yet immunity from process may still not exist as, for example, under the statute of Anne if a person employed in the service of the ambassador is engaged in trade. In no sense, therefore, as is suggested by the Court of Appeal, is the jurisdiction of the Court to determine the existence of immunity ousted merely because, as the Attorney-General submits, a particular form of proof of diplomatic status is conclusive and cannot be questioned.

" 28. If a statement made on behalf of His Majesty that a person has or has not been recognized as a member of the diplomatic staff of a foreign ambassador is not conclusive, and if the Court can go behind the statement and themselves seek to investigate the facts, compelling the person on behalf of whom immunity is claimed to submit to legal process for that purpose, it would be impossible for His Majesty to fulfil the obligations imposed on him by international law and the comity of nations, since the steps taken to investigate the claim would in themselves involve a breach of diplomatic immunity which in the event the Court might decide to have been established.

" 29. Moreover, if His Majesty should by reason of the action of the Courts find himself unable to make effective the obligations towards a foreign State involved in the recognition of persons as members of the diplomatic staff of a foreign ambassador, His Majesty's conduct of foreign affairs will be greatly embarrassed, and a conflict between the judiciary and the executive would arise in a sphere of action in which such a conflict would be most dangerous to the public interest."

1928. June 14, 15. *Jowitt K.C.* and *Pritt K.C.* (with them *W. T. Monckton*) for the appellant. The diplomatic privilege of an ambassador and his staff depends upon the comity of nations, and is recognized by the common law of England as forming a part of international law; and the Diplomatic Privileges Act, 1708 (7 Anne, c. 12), is merely explanatory of that law. That privilege extends to all persons associated in the performance of the duties of the Embassy. It is

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conceded that a consul is not within the privilege, but a member of the Embassy does not forfeit his privilege because in the course of his employment he is engaged in consular work.

[On the general law relating to diplomatic privilege they referred to *Ambassador of Muscovy's Case* (1); *Crosse* v. *Talbot* (2); *Seacomb* v. *Bowlney* (3); *Triquet* v. *Bath* (4); *Heathfield* v. *Chilton* (5); *Darling* v. *Atkins* (6); *Hopkins* v. *De Robeck* (7); *Magdalena Steam Navigation Co.* v. *Martin* (8); *Parkinson* v. *Potter* (9); *Macartney* v. *Garbutt.* (10)]

As to the mode in which this privilege is to be proved, the appellant is content to rely upon the statement made to the Court of Appeal by the Attorney-General on the instructions of the Foreign Office. That statement is conclusive and binding on the Court. In *In re Suarez* (11) a letter from the Foreign Office stating that a foreign Minister's name had been removed from the Diplomatic List was treated as sufficient evidence that the Minister had ceased to hold diplomatic office at the date of the letter, and Scrutton L.J. there speaks of information obtained through the Foreign Office as to the status of foreign dignitaries and their accredited representatives as conclusive. In *Duff Development Co.* v. *Kelantan Government* (12), where the question was as to the sovereignty of a foreign ruler, this House laid down the law as follows: It is the settled practice of the Court to take judicial notice of the status of any foreign Government and in case of doubt to receive information from the appropriate department of His Majesty's Government, and the information so received is conclusive. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter peculiarly within his cognizance. That principle equally applies to the duly

(1) (1710) 10 Mod. 4.
(2) (1724) 8 Mod. 288.
(3) (1743) 1 Wils. 20.
(4) (1764) 3 Burr. 1478, 1481.
(5) (1767) 4 Burr. 2016.
(6) (1769) 3 Wils. 33.
(7) (1789) 3 T. R. 79.
(8) (1859) 2 E. & E. 94, 113, 114.
(9) (1885) 16 Q. B. D. 152, 157.
(10) (1890) 24 Q. B. D. 368.
(11) [1918] 1 Ch. 176, 195, 199.
(12) [1924] A. C. 797, 805, 813, 823–4.

accredited representatives of a foreign power. If His Majesty chooses to recognize a person as an ambassador his status cannot be called in question by the Courts of this country, but they must act on the representation of the Foreign Office. It ill becomes our Courts to question that which the Foreign Office in the name of the King has conceded: *The Parlement Belge* (1), per James L.J. Nor can any distinction be drawn between an ambassador and the ambassadorial staff. The statute of Anne treats both on the same footing. The privilege is the privilege of the ambassador. In the United States this principle has been applied to a chargé d'affaires: *United States* v. *Ortega* (2); to the secretary of a foreign legation: *United States* v. *Liddle* (3); and to an attaché: *United States* v. *Benner*. (4) And see *Torlade* v. *Barrozo*. (5)

The appellant desires to adopt paras. 26–29 of the Attorney-General's case as part of his argument.

In no event should the claim to cross-examine the appellant on his affidavits be allowed, for the proper and convenient course is for the Court to obtain its information as to the status of a person claiming immunity from legal process on the ground of diplomatic privilege through the Foreign Office. It is true that the earlier cases appear to have been tried on affidavit evidence, but in none of those cases was there any cross-examination of the defendant on his affidavit. No trace can be found of any attempt to cross-examine a deponent on his affidavit before the Common Law Procedure Act, 1852.

Ritter for the respondent. Statements made by the Attorney-General as to the position of a person not alleged to be an independent sovereign prince or an ambassador or other public minister received as such by His Majesty are not binding on the Court. The Attorney-General never had any locus standi in these proceedings and he ought not to be heard.

[LORD BUCKMASTER said that their Lordships had decided to hear him.]

(1) (1880) 5 P. D. 197, 199.
(2) (1825) 4 Washington, 531.
(3) (1808) 2 Washington, 205.
(4) (1830) 1 Baldwin, 234.
(5) (1830) 1 Miles (Phil.) 361.

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Sir Thomas Inskip A.-G. (with him *Drucquer*) for the Attorney-General. The contentions of the Attorney-General are set out in paras. 26, 27, 28, 29 of his case. Those statements were prepared with great care by my predecessor in office, Sir Douglas Hogg, as he then was, and I desire to add nothing to them.

Ritter, on the merits. The Court will take judicial notice of the status of a foreign sovereign or of an ambassador, and in case of doubt will inform itself through the Foreign Office, but this judicial notice is confined to the case of a representative directly accredited to the Crown or to the Foreign Office —an ambassador or a chargé d'affaires. The case of an ambassador is peculiarly within the cognizance of the King and the Foreign Office, but the case of an ambassador's servant is not: *Malachi Carolino's Case.* (1) Except for an obscure reference in *Heathfield* v. *Chilton* (2) no case can be found in which any attempt has been made to extend judicial notice to the case of the ambassador's staff. The question whether or no the appellant is in the German Ambassador's diplomatic or domestic service is a question of fact to be ascertained in the ordinary way.

[He also referred to *Mighell* v. *Sultan of Johore* (3); *Foster* v. *Globe Venture Syndicate* (4); Taylor on Evidence, 11th ed., § 4; Best on Evidence, 12th ed., p. 233.

Jowitt K.C., in reply, said that the German Ambassador would not press for costs, but would leave the matter to their Lordships.

The House took time for consideration.

1928. July 18. LORD BUCKMASTER (read by VISCOUNT DUNEDIN). My Lords, the privilege affording ambassadors and other accredited representatives of foreign countries immunity from all writs and processes is an ancient doctrine of the common law declared in terms by the statute 7 Anne, c. 12.

No question is raised on this appeal affecting the existence or the extent of this protection. The sole point for

(1) (1744) 1 Wils. 78.
(2) 4 Burr. 2016.
(3) [1894] 1 Q. B. 149, 159.
(4) [1900] 1 Ch. 811, 813.

determination is the method by which the status of any person who claims the benefit of this privilege is to be determined. For the appellant it is contended that the statement of the Attorney-General on the instructions of the Foreign Office is for this purpose conclusive, while the respondent asserts that any such dispute should be ascertained in the ordinary way according to the usual rules of evidence. The present appeal arises out of the following circumstances: On July 28, 1926, the respondent issued a writ in the King's Bench Division of the High Court claiming against the defendant rent alleged to be due under a lease dated August 18, 1924, and damages for breach of covenant. A conditional appearance was entered by the defendant and a summons was issued by him asking that the writ might be set aside on the ground that he had been a Consular Secretary on the staff of the German Embassy, London, since November 25, 1920, and had been notified as such to the British Foreign Office and that his name appeared in the Diplomatic List issued by the British Foreign Office. It is unnecessary to follow the varying fate of this application before the Master and the judge, for, pursuant to leave, another summons was issued by the appellant on October 26, 1926, asking the same relief as before. On this application, as on the former, the appellant filed an affidavit; prolonged and fruitless proceedings in chambers ensued until finally on March 4, 1927—eight months after the issue of the writ—Shearman J. made an order that the appellant should attend for cross-examination on his affidavit, at the same time granting leave to appeal against his order. The appellant availed himself of this permission and appealed to the Court of Appeal, who on June 23, 1927, confirmed the order of Shearman J., the Master of the Rolls dissenting, and from their judgment this appeal has been brought. In form, therefore, this appeal is against an order for cross-examination, but in substance the dispute is far more important.

On the first day of the hearing of the appeal the Attorney-General informed the Court on their invitation that the defendant "has been appointed as a member of the staff of

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the German Ambassador under the style of Consular Secretary and has been received in that capacity by the British Government. His name has been submitted to the Foreign Office by the Ambassador in the usual way, and his position as a member of the Embassy is, and has been since December, 1920, recognized without reservation or condition of any sort. He has been engaged during the last twelve months, at any rate, as a member of the staff of the Commercial Division of the Embassy. As such he has been obliged to take part from time to time in the general work of the Embassy staff, and particularly as regards the ciphering and de-ciphering of telegrams, that is, telegrams from the German Ambassador to his Government. He is responsible in all that he does to the German Ambassador." He further added that he had himself communicated with the Foreign Office, and was satisfied that the information was correct as to the defendant's position at all relevant dates. If this statement as to status be accepted, no question arises upon the construction of the statute: the defendant would then be entitled to the benefit of the privilege that he invokes. Scrutton L.J., with whom Sargant L.J. agreed, felt himself unable to accept this statement as binding: to do so would, in his opinion, be contrary to principle and unsupported by authority. I find myself unable to agree with this conclusion.

So far as the question of principle is concerned, the case decided in this House of *Duff Development Co.* v. *Kelantan Government* (1) is a clear authority that the method of proving the status either of the sovereigns or of the ambassadors who are their representatives is by the very method that is challenged in the present case. The statute, however, draws no distinction between the ambassadors and what, in the language of the Act of Parliament, is described as the "domestic or domestic servant of any such ambassador," and it seems difficult to understand when the principle is admitted with regard to the one that it should

(1) [1924] A. C. 797.

not apply in relation to the other, for the privilege is the same in each case. With regard to the sovereignty of a particular State and whether or not a particular person is a sovereign ruler, the case referred to makes the general principle plain. As Lord Finlay said (1): "It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance." Lord Dunedin expressed the same opinion in these words: "It seems to me that once you trace the doctrine of (2) the freedom of a Foreign Minister from interference by the Courts of other nations to comity, you necessarily concede that the home sovereign has in him the only power and right of recognition."

Now the acceptance and recognition of persons who form the staff of an ambassador are matters which, having regard to the practice in the conduct of foreign affairs, are equally based on the comity of nations and necessarily also within the cognizance of the Crown acting through the Foreign Office. They are in a position to know what are the duties performed and the persons who perform them, and it is plain that, though they trust the list put forward if it appears from their knowledge to be a list which might reasonably be accepted, yet the list itself is scrutinized, inquiries are made and, if necessary, persons are removed for sufficient reasons. That some such practice is contemplated under the Act itself is plain from the section which provides that no person shall be proceeded against for the arrest of a servant of the ambassador unless his name shall have been registered in the office of one of the principal Secretaries of State and transmitted to the sheriffs of London and Middlesex, who are to hang the list up in some public place. This, of course,

(1) [1924] A. C. 813, 820. (2) The report has "for," a manifest error.

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Lord Buckmaster.

is a negative provision and does not show that the list should be accepted as evidence; but it does contemplate the preparation of a list of people for whom immunity is claimed and its publication in the manner therein provided. The list is not conclusive, nor is it the list itself on which reliance is to be placed, but on the statement of the Crown, speaking through the Attorney-General, stating that a particular person at the critical moment is qualified to be upon the list. When this statement has been made it is difficult to see how it can be questioned without the introduction of proceedings which in the person of the ambassador himself, and equally of his wife and family and staff, it would obviously be undesirable to institute.

But apart from the question of principle, it appears to me that there is valuable information to be found in the authorities. In the case of *Crosse* v. *Talbot* (1) a question arose as to whether a particular person was on the staff of the Duke of Holstein's resident here, and a certificate was produced that he was the valet de chambre of such resident at certain wages. The Court, however, held that he appeared to be a mere nominal servant and that he consequently was not within the privilege, but the certificate of the resident as to what his status actually was does not appear to have been challenged. In cases like *Seacomb* v. *Bowlney* (2) and *Triquet* v. *Bath* (3) the dispute was, in fact, tried upon affidavit and the only questions determined were whether these affidavits showed that the status was adequate to secure the protection. The latter case is interesting because it explains the origin of the passing of the statute of Anne. In *Heathfield* v. *Chilton* (4) the dispute was as to whether the person in whose service was the defendant who had been arrested was himself within the privilege. Lord Mansfield there said that "this is not an application by the Attorney-General. . . . That, indeed, would have shown that the Crown thought this

(1) 8 Mod. 288. [The test there laid down by the Court is that the servant ought "really to execute the duty of his office."—F. P.]

(2) 1 Wils. 20.

(3) 3 Burr. 1478.

(4) 4 Burr. 2016, 2017.

person intitled to the character of a public Minister. It now remains uncertain what his proper character is." Lord Mansfield also added that the registration of a particular person's name in the Secretary of State's office was not a condition precedent to his right of protection. In the case of *Fisher* v. *Begrez* (1) the question was as to whether a chorister was within the protection, and it was there held that the certificate itself was not a sufficient authority that the defendant was, as a chorister, a domestic servant and therefore privileged.

Beyond this, the earlier cases throw little light upon the question now under consideration, and this is possibly due to the fact that in all those cases, the defendant being the subject of arrest, application was immediately made on affidavit for his release, and that the matter could be tried by affidavit, if no intervention took place and if the defendant so liked, is not in dispute. The later cases are more instructive.

In *Macartney* v. *Garbutt* (2) a question arose as to whether a British subject accredited to Great Britain by a foreign Government as a member of its Embassy was liable to distress on the furniture of his house for rent. Such distress had been levied and had been paid out by the plaintiff, who brought an action to recover back the sum. In the course of his judgment Mathew J. said that the plaintiff was an English subject, had been appointed by the Chinese Government English Secretary to the Chinese Embassy and had been received in that capacity by the British Government; his name had been submitted to the Foreign Office in the usual way and his position as a member of the Embassy recognized without reservation or condition of any sort. He would, therefore, seem to be clearly entitled to the privileges of the Corps Diplomatique. The importance of this statement is that the learned judge bases his judgment upon the reception of the person as Secretary by the British Government, the submission of his name to the Foreign Office and his recognition by them. Now those circumstances could only be proved either by a person speaking on behalf

(1) (1832) 1 Cr. & M. 117. (2) 24 Q. B. D. 368.

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of the Crown as representing the Foreign Office, or by such person giving evidence and being subject to cross-examination, but directly the matter is based upon the reception and recognition by the Foreign Office it seems impossible to suggest a reason why such recognition should be good in the case of the ambassador and bad in the case of his staff.

In the case of *The Parlement Belge* (1) there is contained a very important statement by James L.J. Brett L.J. appears to have doubted whether the recognition by the Crown of an ambassador could be accepted if the person in question had not, in fact, been sent as an ambassador, but James L.J. states that that question is outside the authority of any municipal court, and adds: "I apprehend that we should be bound to act on the representation of the Foreign Office." And, in *In re Suarez* (2), it was decided in the Court of Appeal that a letter from the Foreign Office under the hand of an Assistant Secretary of State stating that a Minister's name has been removed from the Diplomatic List is sufficient evidence that he had ceased to hold diplomatic office at the date of the letter.

It is, of course, obvious that the privilege claimed has serious results, as it excludes from their remedies in the Courts the people with whom members of the ambassador's staff may have incurred obligations, and it is possible that it is open to abuse. It is of the essence of all privilege that it may be abused, but that question has nothing to do with the matter we are called upon to decide; the merits of the dispute out of which this question has arisen are in no way before us for consideration. The privilege itself depends upon maintaining the obligations of international law and the comity of nations. It would, indeed, be unfortunate if, after recognition had been afforded by His Majesty through the Foreign Office to people as holding such posts on the ambassadorial staff as entitled them to the privilege and the statement as to their position had been afforded on behalf of the Crown through the Attorney-General, it was to be disregarded by the judiciary, for, in such circumstances,

(1) 5 P. D. 197, 199. (2) [1918] 1 Ch. 176.

the ensuing contest could not possibly inure to the public good.

My noble and learned friend Lord Blanesburgh concurs in the opinion I have just read.

VISCOUNT DUNEDIN. My Lords, I entirely concur with what has been said by the noble and learned Lord on the Woolsack as to the unfortunate way in which this case was begun. Had the question remained merely as to whether cross-examination was permissible upon an affidavit in which the appellant set forth his own status, I should have been of opinion with the Court below. But, in truth, the whole case was altered funditus when the Attorney-General intervened.

The respondent tried to convince us that, if this case was decided in favour of the appellant, it was opening the door to the granting of diplomatic privilege to the consular service. It is nothing of the sort. Mr. Engelke will enjoy diplomatic privilege not because he is styled Consular Secretary but because he, as an accredited member of the Ambassador's household, has privilege as such and does not forfeit it because he does some consular work. In the case of *Duff* v. *Kelantan* (1) in this House it was pointed out that the acknowledgment of diplomatic privilege entitling immunity from being sued in the tribunals of this country rests on comity, and that the statute of Anne does no more than confirm the common law and annex certain penalties to those who transgress it. Mr. Engelke is, in the words of the statute, "a domestic of the Ambassador." In the Oxford Dictionary "domestic" as a substantive is defined as "a member of the household; one who dwells in the same house as another; an inmate"; and in 1656 there is a quotation, "From that time he had his accesses . . . . to His Majesties presence as a domestique without ceremony." To prove that he is so rests on the fact that it has been brought to the notice of the Court through the Attorney-General, as the mouthpiece of the Foreign Office, that Mr. Engelke was presented to the Foreign Office as belonging to the personal staff of the Ambassador in the

(1) [1924] A. C. 797.

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list supplied by him to the Foreign Office and accepted as such by the Foreign Office. In such a case the comment which I made in *Duff's* case (1) and which, I think, was quoted by the Master of the Rolls, seems to me directly in point. The Attorney-General, in his very careful statement, shows that the acceptance of the list is no matter of necessity, but that it is subjected to careful scrutiny. This seems to me to obviate the possibility of abuse, or of such extension of privilege if it was sought to include the whole consular service.

The judgment of the Court of Appeal should be reversed and a declaration made that the appellant is entitled to diplomatic privilege.

LORD PHILLIMORE. My Lords, the plaintiff in this case brought an action claiming certain relief against the defendant in respect of the lease of a house. The defendant, who claims diplomatic privilege as one of the staff of the German Embassy, entered a conditional appearance and took out a summons for an order that the writ be set aside. In support of this summons he filed an affidavit by his solicitor speaking partly to the deponent's own knowledge, but mainly upon information and belief. This affidavit was rejected, perhaps unfortunately, by Talbot J. as being insufficient even to raise the point. Thereupon, the defendant filed his own affidavit and then a further affidavit on his own behalf, and the plaintiff being minded to contest the accuracy of the statements contained in these affidavits applied to cross-examine the defendant upon them. The defendant, upon the instructions of the Ambassador, declined to submit himself to cross-examination, and after the matter had been to and fro in a not very edifying series of applications to Master and judge, it came before the Court of Appeal.

Before that Court the Attorney-General appeared, instructed by the Foreign Office, to give certain information as to the status of the defendant, and after he had given that information, the Court nevertheless, by a majority, affirmed the decision of the judge at chambers directing that the defendant should

(1) [1924] A. C. 797.

attend for the purpose of cross-examination. It is from this order of the Court of Appeal that the appeal has now been brought to your Lordships' House.

The description which the defendant gave of himself and which has been given of him by the Foreign Office is, that he is a Consular Secretary on the staff of the German Ambassador, and the argument for the plaintiff rested on the expression consular with a suggestion that an attempt was being made to get diplomatic privileges for a person who was not truly diplomatic but only in the consular service. For reasons which will appear in the course of this opinion, it is not necessary to go very deeply into this point, but I may observe that the positions of diplomat and consular employee are not mutually exclusive, and that indeed it has been in the past not uncommon to clothe a consul or consul-general with certain diplomatic functions and thereby to give him a diplomatic status. But the question before your Lordships turns on other matters.

If this case now turned upon the question whether the defendant should be cross-examined upon his affidavit, or not, it may be that the result would be unfavourable to him. Where an application is made to stop a suit in limine and the application rests upon a disputed matter of fact, it would be right that the evidence should be scrutinized. On the other hand, where an applicant is claiming that he is privileged from litigation it seems a strange result if he is forced to litigate in order to obtain his exemption from litigation.

But as the defendant is now content to rely solely upon the certificate of the Foreign Office delivered to the Court by the Attorney-General, it is unnecessary to consider the question of cross-examination.

The objection taken on behalf of the plaintiff to the reception of this certificate and the criticism of its weight seem to me to rest upon misapprehensions as to the nature of diplomatic privilege.

By international law, which is part of the common law of this country, an Ambassador, by which term I intend to include diplomatic agents of all sorts—the stately Ambassador,

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in the restricted sense of the word, the special envoy, the resident minister, and the chargé d'affaires—is sent by the one country and received by the other upon the term that he has among his other diplomatic privileges immunity from legal process in the Courts of the country which receives him. The reasons for this immunity are well expressed in *Magdalena Steam Navigation Co.* v. *Martin.* (1)

This immunity being accorded to him in order that he may transact his Sovereign's business, is a privilege which he cannot waive unless under direction from his Sovereign.

The Ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word " domestic " in the statute of Anne, and his ordinary servants, described in the statute as " domestic servants," with a possible reservation in the case of domestic servants who are nationals of the receiving country. The privilege of all these persons is a derived privilege created for the benefit of the Ambassador and may be waived by him, but should, unless waived, be taken by them for the Ambassador's benefit.

But just as the receiving State may intimate that a proposed Ambassador will not be agreeable to it and will be refused, so, if the Ambassador tenders a person as a domestic or domestic servant, the receiving State may refuse to accept and recognize the man as such, and when the person tendered is a subject of the receiving country conditions may be made. In old days, a resident minister or chargé d'affaires was not unfrequently a subject of the receiving country, distinguished from an envoy who, as the derivation of the word shows, would be sent from the one country to the other. I take it that in living memory our business at the Court of the ruler of Afghanistan was conducted on this footing. But generally now, the Ambassador is a subject of the sending and not of the receiving country, and is therefore said to be

(1) 2 E. & E. 94.

extra-territorial. But his domestic servants or some of them will almost certainly be subjects of the receiving country, and in certain cases some members of the staff may be drawn from the receiving country. The case of *Macartney* v. *Garbutt* (1) affords such an instance. Sir Halliday Macartney was appointed English Secretary to the Chinese Legation and as the case narrates, his appointment was communicated to and accepted by the Foreign Office without conditions, though, as he was a British subject, it might have been made subject to the condition that no privilege was claimed for him. The Siamese Legation has had to my knowledge similar English Secretaries, but whether they were accepted by the Foreign Office conditionally or unconditionally, I know not.

When we come to the ordinary domestic servant, it may well be, that if he be a British subject, the Foreign Office may intimate that they cannot accept him so as to give him privilege. But according to English law (which may in respect of the domestic servant who is a national go somewhat beyond general international law) once the man is tendered as a domestic or as a domestic servant, and the tender is accepted, the status is created and the privilege attaches.

When therefore the certificate from the Foreign Office was delivered by the Attorney-General, it was not, as suggested on behalf of the plaintiff, a piece of hearsay evidence, a mere narrative of what the Ambassador had told the Foreign Office. It was a statement of what the Secretary of State on behalf of His Majesty had done, not what he was doing ad hoc, or what he was believing and repeating, but what the Foreign Office had done. The certificate is no attempt on the part of the executive to interfere with the judiciary of the country. The status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law.

For the plaintiff, reliance was not unnaturally placed upon a number of cases principally in the eighteenth century where privilege was asserted by an application to discharge

(1) 24 Q. B. D. 368; 62 L. T. 656.

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the defendant supported by an affidavit of the facts, whether made by or on behalf of the defendant; and it was submitted that this was the only way in which the status (except in the case of the actual Ambassador) could be proved, with a further submission that the proper consequence would be that the deponent might be cross-examined. It would seem that the privilege might be claimed and proved in this manner, but there were reasons for this procedure which no longer exist, and there are objections to it in principle which seem to me to make it a less desirable course.

In these eighteenth century cases, the defendant seems always to have been a British subject. I should gather that in most of them he was not on the sheriffs' list, and I would insist upon this, not because of the direct importance of the list, but because he would have been on the list if he had been made known to the Foreign Office and accepted as one of the Ambassador's retinue, and it follows therefore that he never had been tendered and accepted and was reduced to proving his privilege in fact by showing his service.

My next observation would be that according to the procedure of those days process was initiated by arrest of the person and that a defendant had perforce to submit so far to the jurisdiction as to procure his release by giving bail. Further I would observe that counsel have told your Lordships that the result of their researches is that cross-examination upon affidavit was an unknown form of procedure till introduced by the Chancery Procedure Act of 1852, so that the affidavit of the eighteenth century was merely a solemn mode of making a claim. It was indeed the only way, as far as I know the old procedure, because I conceive that a suggestion on the roll would not be applicable and that the only form of process would be by a rule nisi supported by affidavit.

Such defendants not having been made known to the Secretary of State could not well expect to have the benefit of the procedure suggested by Lord Mansfield in *Heathfield* v. *Chilton*. (1) I quote his words: "I find this is not an

(1) 4 Burr. 2016, 2017.

application by the Attorney-General, by the direction and at the expense of the Crown. That, indeed, would have shown that the Crown thought this person intitled to the character of a public Minister."

The case of *Fisher* v. *Begrez* (1) is perhaps the most favourable to the plaintiff. There the claim of privilege was disallowed, and there are expressions in the report to the effect that the certificate from the Secretary of State was not conclusive; but what is referred to is not a real certificate, but the sheriffs' list, and the reason given is that a man may well have been put on the list as being at the time in the suite of an Ambassador, and yet be no longer in that capacity. There was not, as in this case, a certificate de praesenti. It may be further noticed that the claim for privilege was made in respect of a writ of fi. fa., so that the case must have proceeded to judgment without any such claim having been made, and it seems to have been an after-thought.

The case of the Russian Ambassador which led to the statute 7 Anne, c. 12, is related by Lord Mansfield in the case of *Triqet* v. *Bath* (2), and is given more at length in Blackstone's Commentaries, vol. i., p. 255, repeated by Stephen. Blackstone got his account from Boyer's Annals of Queen Anne, vol. vii., pp. 235-242. Lord Mansfield, following, I think, the train of thought which he expressed later in *Heathfield* v. *Chilton* (3), seems rather to complain that in that case there was no direct intervention by the Attorney-General. He observes as follows: "If proper application had been immediately made for his discharge from the arrest, the matter might and doubtless would have been set right. Instead of that, bail was put in, before any complaint was made." I do not, however, know what the unfortunate Ambassador could have done. His carriage was stopped, he was dragged out of it with violence and taken to a sponging house, where he had to remain till two distinguished persons put in bail for him. He then went straight to the Queen to complain, and the whole Diplomatic Corps

(1) 1 Cr. & M. 117. (2) 3 Burr. 1478, 1480.
(3) 4 Burr. 2016.

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joined in protesting, whereupon the delinquents were summoned before the Privy Council, of which it is stated that the Lord Chief Justice Holt was sworn a member, apparently in order that he might sit. One of the persons complained of was discharged, but the rest were committed to prison, and the Attorney-General was directed to file an information against them, on which they were convicted, judgment being reserved, in order to consider the international law; but the Tsar having been mollified by the passing of the Act of Parliament, and the presentation of an elaborately engrossed copy, desired that they should not be punished, and they were accordingly released.

It does not appear that any steps were taken to vacate the bail bond or dismiss the suit. Probably, any such step was deemed unnecessary. There was intervention by the Crown, but after a different fashion.

I have already observed that in my judgment there are objections in principle against driving a defendant to the course adopted in the eighteenth century cases. The object to be attained is immunity from the vexation of litigation with its impediments to the discharge of the functions of the domestic or domestic servant, as illustrated in the case which I have already quoted of the *Magdalena Steam Navigation Co.* v. *Martin.* (1) Absolute freedom is difficult to procure. Litigation, as Mellish L.J. observed in *Ex parte Edwards* (2), usually begins ex parte, and a defendant served with a writ must enter an appearance even if it be only a conditional appearance, or he will have judgment against him, and he must follow up appearance by a summons to set aside the writ. All this is unfortunate, and is intended to be provided against in our country by the statute of Anne and the sheriffs' list. But the only compensation, if it be compensation, is to give the defendant his costs. If possible, there should be no further interference with him, but if he is put to file an affidavit it is a further step in de facto submission. If he has to attend for cross-examination, it is a further submission and not unlikely to interfere with the discharge of his other duties.

(1) 2 E. & E. 94. (2) (1873) L. R. 9 Ch. 138.

Where the man's chief has not taken the precaution of tendering the man and procuring his acceptance, the man may have still to prove his status aliunde. But where the man has been tendered and accepted the joint act creates a status, which can only be removed by showing that his duties have ceased or that he has engaged in trade.

My Lords, if I am not mistaken, when a question arises in the Law Courts as to whether a ruler is a Sovereign, and a proper Secretary of State is consulted, the right answer is not "A.B. is a Sovereign," but "A.B. is recognized by His Majesty as a Sovereign," so I think, the exact inquiry in this case is not whether the defendant is a member of the Ambassadorial staff but whether he has been accepted and recognized by the Crown as such a member, and it appears to me that he has so been.

Therefore, my Lords, I think that this appeal should be allowed.

LORD WARRINGTON OF CLYFFE. My Lords, the appellant is defendant in an action brought against him by the respondent Musmann for the recovery of rents reserved by and damages for breach of covenants contained in a lease dated August 18, 1924, made between the respondent of the one part and the appellant of the other part of certain premises at Hampstead.

The appellant having entered a conditional appearance applied to have the writ and all subsequent proceedings set aside on the ground that he is a Consular Secretary on the staff of the German Embassy and, therefore, entitled to immunity from civil proceedings.

In support of this application he filed affidavits stating the nature of his employment and making the claim to immunity.

On March 4, 1927, Shearman J., on an appeal from a decision of Master Moseley, given in chambers on February 15, 1927, ordered the appellant to attend for cross-examination, but gave leave to appeal.

The appeal came before the Court of Appeal on April 12

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and May 30 and 31, 1927. The Attorney-General attended and at the request of the Court informed them that the appellant had been appointed a member of the staff of the German Embassy, under the style of Consular Secretary, and had been received in that capacity by the British Government, that his name had been submitted to the Foreign Office by the German Ambassador in the usual way, and that his position as a member of the Embassy was and had been since December, 1920, recognized without reservation or condition of any sort. He gave the Court certain further information as to the particulars of the appellant's employment which it is not necessary to state in detail, and stated that he gave the information both on the instructions of the Foreign Office and on his own responsibility as Attorney-General.

On June 23, 1927, the Court of Appeal by a majority, Scrutton and Sargant L.JJ. (the Master of the Rolls dissenting), made an order affirming the order of Shearman J. This is an appeal from that order.

On November 25, 1927, the Attorney-General lodged a petition to this House praying leave to intervene in this appeal and to lodge a case and to be heard thereon. The prayer of this petition was granted by the Appeal Committee, reserving to the respondent Musmann the right to take on the hearing of the appeal such preliminary objection to the Attorney-General being heard as he might be advised.

The Attorney-General accordingly lodged a case and appeared before your Lordships, but the respondent objecting to his being heard, and the Attorney-General stating that the printed case contained all that he desired to say, he did not address any argument to your Lordships.

The real question, therefore, and it is an important one, is whether in such a case information given by the Attorney-General under the circumstances stated above as to the diplomatic status of a person claiming immunity from civil process is conclusive as to the fact of such status. If it is, then cross-examination on an affidavit with the object of displacing the effect of the information, would be irrelevant and useless and ought to be refused.

It must be borne in mind that all that is directly in issue is the fact of the appellant's status. Whether, that fact being established, a defendant is entitled to the immunity he claims is a further question, which might have to be determined by the Court. In the present case, however, it does not appear that there is in issue any question of law or fact other than that of status.

It is now well settled that in certain matters connected with our relations with foreign States it is for the Court to take judicial notice of the facts relating thereto, and further that in all matters of which the Court takes judicial cognizance the Court may have recourse to any proper source of information, and there is no question that in such a case as the present the source of information actually applied to was the proper source.

The information so obtained is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance, and the Court is bound to act on such a statement: see the opinion of Lord Finlay in *Duff Development Co.* v. *Kelantan Government.* (1)

It is admitted that amongst the matters of which the Court is bound to take judicial cognizance are the status of an Ambassador himself and even that of a mere chargé d'affaires. In the case of *Macartney* v. *Garbutt* (2), it would seem, though it is not quite clear, that the Court acted on information obtained from a Government Department, in that case the Home Secretary, as to the status of the English Secretary of the Chinese Embassy. But once it is established, and I think it is, that the Court takes judicial cognizance of the status of any member of a Foreign Embassy, it is impossible on any principle to draw a distinction between one class of member and another and to say that the rule applies to the first and not to the second.

The Attorney-General states explicitly in para. 26 of his case that it is a necessary part of His Majesty's prerogative in his conduct of foreign affairs and his relations with foreign

(1) [1924] A. C. 797, 813. (2) 24 Q. B. D. 368.

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States and their representatives to accord or refuse recognition to any person as a member of a foreign ambassador's staff exercising diplomatic functions. The fact of recognition is of course peculiarly within the knowledge of the Department according it, and a statement by or on behalf of the Department that it has been accorded to any person must in my opinion come within the principles above referred to and be conclusive as to the status of that person.

It may be added that the Attorney-General states in his printed case that, for the purpose of obtaining recognition of the members of an ambassador's staff exercising diplomatic functions, a list of such members is furnished from time to time to the Secretary of State by every ambassador. The list is not accepted as of course on behalf of His Majesty, and after investigation it not infrequently happens that recognition is withheld from a person whose name appears upon the furnished list, either because his diplomatic status is in doubt, or because the number of persons for whom status is claimed appears to the Secretary of State to be excessive.

I have not thought it necessary to discuss the many cases which were cited in this House. It is enough to say that some of them support and no one of them is opposed to the views I have above expressed.

I have also thought it unnecessary to say anything about the statute of Anne. It is well settled that the questions we have been discussing do not depend on the statute but are principles of common law having their origin in the idea of the comity of nations.

For the reasons above expressed I am of opinion that this appeal should succeed and the orders of the Court of Appeal and Shearman J. should be discharged, and a declaration made as proposed from the Woolsack. The appellant does not ask for costs and the order will therefore be without costs here or below.

Order of the Court of Appeal reversed, and declared that the appellant is entitled to diplomatic privilege. Each party to bear his own costs here and below. Cause remitted

back to the King's Bench Division to do therein as shall be just and consistent with this judgment.

Lords' Journals, July 18, 1928.

Solicitors for the appellant: *Buckeridge & Braune.*
Solicitors for the respondent: *Glynn, Barton & Pocock.*
Solicitor for the Attorney-General: *Treasury Solicitor.*

[PRIVY COUNCIL.]

ESHUGBAYI ELEKO . . . . . APPELLANT;

AND

OFFICER ADMINISTERING THE GOVERNMENT OF NIGERIA AND ANOTHER . . . . . RESPONDENTS.

J. C.* 1928 *June* 19.

ON APPEAL FROM THE SUPREME COURT OF NIGERIA.

Habeas Corpus—Practice—Application for Writ—Successive Applications to different Judges—Nigeria—Supreme Court of Nigeria.

Each judge of the High Court of Justice established by the Judicature Act, 1873, has jurisdiction to entertain an application for a writ of habeas corpus, in term time or in vacation, and is bound to hear and determine the application on its merits, notwithstanding that some other judge has already refused a similar application.

The same principle applies in the case of the judges of the Supreme Court of Nigeria.

Judgment of the Supreme Court of Nigeria reversed.

APPEAL (No. 127 of 1927) from a judgment of the Full Court of the Supreme Court of Nigeria (June 10, 1926) affirming a judgment of Tew J. of that Court.

On October 12, 1925, a motion by the appellant in the Supreme Court for the issue of a writ of habeas corpus was dismissed by the acting Chief Justice (Webber J.), who after

* *Present:* LORD HAILSHAM L.C., LORD BUCKMASTER, and LORD WARRINGTON OF CLYFFE.

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a full consideration of the facts was of opinion that the applicant's detention was lawful. On December 4, 1925, the appellant gave a fresh notice of motion in the Supreme Court to the same effect. Tew J. dismissed the motion on a preliminary objection by the Attorney-General, supported by an affidavit, that the motion was based upon the same material as the previous motion.

An appeal to the Full Court was heard by Combe C.J., Van der Meulen and Berkeley JJ., and was dismissed. The learned Chief Justice, with whose judgment the other members of the Court concurred, was of opinion that an application on the same grounds having been refused by a judge of the Supreme Court, no other judge of that Court had jurisdiction to entertain the present application.

1928. April 30; May 1. *Montgomery K.C.* and *Horace Douglas* for the appellant. The law in Nigeria with regard to the issue of writs of habeas corpus is the same as the law in England. The facts upon which the application was based have never been judicially inquired into. But even if the merits were fully considered upon the first application the appellant was entitled to apply to another judge, and to have his independent decision. In *Cox* v. *Hakes* (1) in the House of Lords Lord Halsbury said that if upon the return to a writ of habeas corpus release was refused "a person detained might—see *Ex parte Partington* (2)—make a fresh application to every judge or every Court in turn, and each Court or judge was bound to consider the question independently and not to be influenced by the previous decisions refusing discharge." It is conceded that Lord Bramwell (3) appears to have considered that the right was merely to go from one Court to another Court, but no member of the House expressly dissented from the view expressed by Lord Halsbury. In *Ex parte Partington* (4) the application was to the Court of Exchequer after an application to the Lord Chief Baron, thus involving a second application in the same Court. In

(1) (1890) 15 App. Cas. 506, 514.
(2) (1845) 13 M. & W. 679.
(3) 15 App. Cas. 506, 523.
(4) 13 M. & W. 679.

In re Cobbett (1) Baron Parke expressly said that there was a right to go from Court to Court and from judge to judge. In *Secretary of State for Home Affairs* v. *O'Brien* (2) Lord Shaw referred with approval to the passage in Lord Halsbury's judgment containing the language already cited. The report of *Barnardo* v. *Ford* (3) in the House of Lords shows that in that case a Divisional Court made an order nisi for the issue of the writ, although it had been refused by a judge. Text-books of authority recognize that an applicant can go from one judge to another judge: e.g., Short & Mellor's Crown Office Practice, 2nd ed., § 217, p. 320. [Reference was made also to *Ex parte Napierre* (4); *Ex parte Le Gros* (5); and Viner's Abridgement, Habeas Corpus C. (6.).]

Hon. Stafford Cripps K.C. and *S. E. Pocock* for the respondents. The history of the writ as stated in Blackstone's Commentaries, bk. 3, ch. 8, shows that under the practice then existing an applicant had to apply to the Court by motion, and could apply to each of the four Courts successively; it does not indicate that there could be successive applications to different judges of the same Court. In *Ex parte Partington* (6) the application to the Lord Chief Baron was in chambers, and Baron Parke said that the applicant had a right to the judgment of the Court, and that he had that right although there had been a previous application to the Court of Queen's Bench. In *Ex parte Cox* (7) Lord Esher said: "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession." Although the actual decision of the Court of Appeal in that case as to the right of appeal was reversed by the House of Lords in *Cox* v. *Hakes* (8) none of the learned Lords expressly dissented from the above categorical statement by Lord Esher; Lord Bramwell clearly agreed with it. The language used by Lord Halsbury is not inconsistent with Lord Esher's statement. When the

(1) (1845) 5 L. T. (O. S.) 130.
(2) [1923] A. C. 603, 637, 638.
(3) [1892] A. C. 326, 328, 329.
(4) Times, August 7, 1906.
(5) [1914] W. N. 31.
(6) 13 M. & W. 679.
(7) (1887) 20 Q. B. D. 1, 13.
(8) 15 App. Cas. 506.

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spoke of "each Court or judge," he meant each Court or each judge representing the Court; the words do not necessarily indicate that in Lord Halsbury's view there could be successive applications to different judges of the same Court. He based his statement on *Ex parte Partington* (1), and the true view of Baron Parke's judgment in that case is that an applicant can go to each Court, but to each Court once only. It is conceded that if the present contention is right the Judicature Act, 1873, by combining the Courts into one High Court of Justice, limited the previously existing rights of the subject; that probably was an unforeseen result, and in any case the rights of the subject in the matter are sufficiently protected. It may be that after the Habeas Corpus Act, 1679, which first gave power to grant the writ in vacation, an applicant could make successive applications in vacation time to different judges. There is however no reported case showing successive applications to different judges of the same Court. The case which went to the House of Lords as *Barnardo* v. *Ford* (2) was not a "criminal cause or matter" within s. 47 of the Judicature Act, 1873, and presumably the hearing by the Divisional Court was on appeal from the judge in chambers. Considered judgments of the Supreme Court of New Zealand in *Ex parte Bouvy* (3), and of the Court of Appeal in British Columbia in *In re Loo Len* (*No.* 2) (4), support the view now contended for. [Reference was made also to *Crowley's Case*. (5)]

Montgomery K.C. replied.

June 19. The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. The facts which give rise to this appeal can be shortly stated; but the question of law involved is one of grave constitutional importance to His Majesty's subjects in this country as well as in the Overseas Dominions.

By the Deposed Chiefs' Removal Ordinance of 1917, as amended in 1925, it was provided that: "When a native

(1) 13 M. & W. 679.
(2) [1892] A. C. 326.
(3) (1900) 18 N. Z. L. R. 910.
(4) [1914] 1 Dom. L. R. 910.
(5) (1818) 2 Sw. 1.

chief or a native holding any office under a native administration or by virtue of any native law or custom has been deposed or removed from his office by or with the sanction of the Governor . . . . the Governor may : (*a*) if native law and custom shall require that such deposed chief or native shall leave the area over which he exercised jurisdiction or influence by virtue of his chieftaincy or office . . . . by an Order under his hand direct that such chief or native shall within such time as shall be specified in the Order leave the area over which he had exercised jurisdiction or influence, and such other part of Nigeria adjacent thereto as may be specified in the Order, and that he shall not return to such area or part without the consent of the Governor." " (2.) Any deposed chief or native who shall refuse or neglect to leave such area or part of Nigeria as aforesaid as directed by the Governor . . . . shall be liable to imprisonment for six months, and the Governor may by writing under his hand and seal order such deposed chief or native to be deported, either forthwith or on the expiration of any term of imprisonment to which he may have been sentenced as aforesaid, to such part of Nigeria as the Governor may by such Order direct."

On August 6, 1925, the acting Governor purported to make an order under the said Ordinance in the following terms: " Whereas Eshugbayi, a native chief holding the office of Eleko in the Colony, has with my sanction been deposed and removed from his office, and whereas native law and custom requires that the said Eshugbayi shall leave the area over which he exercised influence by virtue of his office: Now therefore I do hereby direct that the said Eshugbayi shall leave the said Colony and the Province of Abeokuta Ijebu and Ondo within twenty-four hours of the service of this Order, and that he shall not return to any of the said areas without my consent."

On August 8, 1925, the acting Governor made a further order reciting the order of August 6, reciting that the appellant had refused or neglected to comply with it, and ordering that the appellant should be deported forthwith to Oyo in the Province of Oyo.

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Immediately upon service of the order of August 6 the appellant gave notice of motion for leave to set aside the order and to stay execution upon it. This motion was heard on August 7 and 8 by the acting Chief Justice of Nigeria, and on August 8 the motion was dismissed. Upon the dismissal of the motion the appellant gave notice of motion on August 8 for leave to issue a writ of habeas corpus, and on August 10 leave was granted for a rule nisi for a writ of habeas corpus returnable on August 13. On August 13 cause was shown against the rule, and the rule was discharged on technical grounds without going into the merits. Meanwhile the appellant on the same August 8 had issued a writ against the acting Governor and the Chief Secretary of the Government of Nigeria, claiming a declaration that the order of August 6, 1925, was void, and asking for an injunction to restrain the defendants from taking any steps under the order. On August 19 the Attorney-General moved to stay or dismiss this action as being frivolous and vexatious and an abuse of the process of the Court. The motion was heard by the acting Chief Justice, and on September 7, 1925, he ordered that the action should be dismissed on these grounds.

On September 18, 1925, the appellant gave a fresh notice of motion for leave to issue a writ of habeas corpus, and on October 12, 1925, the acting Chief Justice gave judgment refusing the motion. The learned judge held that the orders of August 6 and 8 had been validly made and that the detention of the appellant was therefore lawful. On December 4, 1925, the appellant gave a fresh notice of motion for a writ of habeas corpus. This motion was heard before Tew J. on December 8, 1925, when the Attorney-General took a preliminary objection that a similar application based on the same material had been made by the appellant and had been dismissed by the acting Chief Justice, and that in view of that refusal the application could not be entertained; and on December 14, 1925, the learned judge gave judgment upholding the objection and dismissing the motion on that ground. The appellant appealed against this decision and,

on the hearing of the appeal, took the point that there was no evidence that the previous application had been made or that it had been based on the same ground; and the Court directed that the case should be returned to the learned judge in order that evidence might be filed upon these points. Accordingly, on March 9, 1926, an affidavit was filed by the Solicitor-General, and on March 15, 1926, Tew J. reheard the motion and dismissed it on the same ground as before. From this decision the appellant again appealed, and on June 1, 1926, the Full Court in a considered judgment dismissed the appeal and upheld the view of Tew J., that the preliminary objection prevailed and that he had no jurisdiction to entertain the application. It is from this decision that the present appeal is brought before the Board.

On the hearing before this Board the appellant contended in the first place that there never had been a decision on the merits of his application, and that the dismissal of the second motion for a habeas corpus by the acting Chief Justice had been merely on technical grounds. Even if this contention were relevant, it was not in fact made out. In their Lordships' view it is clear from a perusal of the judgment that the merits were most carefully considered by the acting Chief Justice, and that the refusal was based expressly upon the learned judge's view upon the merits of the application.

But it was further contended on behalf of the appellant that by the common law of this country, which applies in Nigeria, it is the right of any imprisoned person to apply successively to every tribunal competent to issue a writ of habeas corpus, and that each tribunal must determine such an application upon its merits unfettered by the decision of any other tribunal of co-ordinate jurisdiction, even if the grounds urged are exactly the same. On behalf of the respondent Mr. Stafford Cripps admitted the existence of the right to make successive applications; but he argued that the applications must be to different Courts. He pointed out that in the present case each application had been made to the Supreme Court of Nigeria, and he contended that since that Court had determined the matter by dismissing the application on October 12, no

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fresh application based upon the same materials could be entertained by that Court. In support of this argument he cited the language of Lord Esher in *Ex parte Cox* (1): "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the Courts in succession." He pointed out that, although the decision of the Court of Appeal had been overruled in the House of Lords, where the case is reported under the name *Cox* v. *Hakes* (2), none of the learned Lords had dissented from Lord Esher's statement of the law, and Lord Bramwell's language (3) seemed to indicate that his view of the old practice was the same. He further called attention to the fact that no instance could be found in the books of applications being made to successive judges of the same Court, and he cited decisions in New Zealand in *Ex parte Bouvy* (4) and of the Court of Appeal of British Columbia in *In re Loo Len* No. 2 (5) to the same effect.

This constitutes a formidable body of judicial opinion, and their Lordships have thought it right, therefore, to examine with some care the earlier history of the writ. This will be found set out in Hale's Pleas of the Crown, vol. ii., p. 143; in Bacon's Abridgement under the title "Habeas Corpus, Section B"; in Sir William Blackstone's Commentaries, bk. 3, ch. 8, i, pp. 131 et seq.; and in the discussion of Blackstone's opinion appearing in Lord Eldon's judgment in *Crowley's Case*. (6) From these authorities it appears that the writ of habeas corpus was originally issuable out of the Court of King's Bench and out of the Court of Chancery; but that in very early days the Courts of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice had been gradually extended to other cases. In the seventeenth century the Habeas Corpus Act, 1640 (16 Car. 1, c. 10), expressly recognizes the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679

(1) 20 Q. B. D. 1, 13.
(2) 15 App. Cas. 506.
(3) Ibid. 523.
(4) 18 N. Z. L. R. 601.
(5) [1924] 1 Dom. L. R. 910.
(6) 2 Sw. 39.

(31 Car. 2, c. 2, s. 10), enacts that it shall be lawful to move and obtain habeas corpus as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or any one of His Majesty's justices might grant a habeas corpus in vacation, and imposed heavy penalties upon any judge who wrongfully refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive judges of the same Court. This led to the curious result upon the respondent's argument that if application were made in vacation it could be renewed to each judge of the Court, but that if it were made in term it could only be made once to the Court of Chancery and once to each of the three Courts of common law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873. That statute combined into one Court the old High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes. If, therefore, the respondent is right in contending that an application for a writ of habeas corpus can only be entertained once by any one Court, it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three common law Courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of habeas corpus is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for simplification of procedure should have materially cut down that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded.

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It is true that there is no reported case before the year 1873 of applications being made to successive judges of the same Court; but it must be remembered that the common law Courts usually sat in banco, so that an application to the Court was in effect an application to all the judges of the Court sitting together; and there is a precedent for application being made to a judge of the Court of Exchequer sitting in chambers and a subsequent application being made to the Court of Exchequer in the case of *Ex parte Partington* (1), where Baron Parke says: "This case has already been before the Court of Queen's Bench, on the return of a habeas corpus, and before my Lord Chief Baron at chambers, on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every Court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute, without considering ourselves as concluded by these decisions."

If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the Courts have been combined in the one High Court of Justice, each judge of that Court still has jurisdiction to entertain an application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria.

It follows that, in the opinion of this Board, the learned judge was wrong in refusing to hear the application in the present case on its merits, and the appeal must be allowed. In expressing that view, their Lordships must not be taken to be offering any opinion upon the merits of the application or upon the validity of the orders impugned. These matters

(1) 13 M. & W. 679, 683.

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will be investigated by the learned judge who hears the application, and will be decided by him on the evidence already filed and any further evidence which may be placed before him. The appellant must have the costs of his appeal here and below; the costs of the application before Tew J. must abide the result of the rehearing.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *E. F. Hunt.*
Solicitors for respondents: *Burchells.*

[PRIVY COUNCIL.]

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June 25.

RECTOR AND CHURCHWARDENS OF THE PARISH OF ST. NICHOLAS ACONS . . . . . } APPELLANTS;

AND

LONDON COUNTY COUNCIL . . . . RESPONDENTS.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY.

Ecclesiastical Law—Faculty—Disused Burial Ground—Electricity Transformer Chamber—"Erect any Buildings upon"—Disused Burial Grounds Act, 1884 (47 & 48 *Vict. c.* 72), *s.* 3.

The appellants applied for a faculty authorizing the construction of an electricity transformer chamber within the area of a city churchyard which was subject to the Disused Burial Grounds Act, 1884. The proposed chamber was to be a brick-built structure with a roof of asphalt supported by steel girders and reinforced concrete; the roof was to be under the surface of the churchyard with two ventilators projecting about nine inches above the surface.

Sect. 3 of the above Act provides that "it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship":—

Held, that the proposed transformer chamber was prohibited by s. 3, and that the Ecclesiastical Courts had no jurisdiction to grant the faculty applied for.

Judgment of the Arches Court of Canterbury [1928] P. 102 affirmed.

In re St. Nicholas Cole Abbey [1893] P. 58 disapproved.

* *Present:* LORD HAILSHAM L.C., LORD BLANESBURGH, LORD ATKIN; with, as assessors, the ARCHBISHOP OF CANTERBURY and the BISHOPS OF ROCHESTER, NORWICH and CHICHESTER.

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APPEAL (No. 11 of 1928) from a judgment of the Arches Court of Canterbury (January 24, 1928) affirming a judgment of the Consistory Court of London (July 16, 1927).

The sole question arising upon the present appeal was whether the construction of a chamber to contain machinery for transforming electric current within the area of a city churchyard, which was a disused burial ground within the Disused Burial Grounds Act, 1884, was prohibited by s. 3 of that Act.

The appellants applied to the Consistory Court of London for a faculty authorizing them to enter into an agreement with the City of London Electric Lighting Company, Ld., for the construction of the transformer chamber in question.

The facts, and the terms of s. 3 of the Disused Burial Grounds Act, 1884, appear from the judgment of the Judicial Committee.

The Chancellor of the Consistory Court (Mr. F. H. L. Errington) held that the structure proposed was within the prohibition contained in s. 3 of the Act, and that therefore he had no jurisdiction to grant the faculty. In his opinion he was not bound by the grants of faculties in the cases reported under the title *In re St. Nicholas Cole Abbey* (1), since the petitions had been unopposed and the Act apparently was not referred to.

Upon appeal to the Arches Court of Canterbury the decision was affirmed by the Dean of Arches (Sir Lewis Dibdin).

Both judgments are reported at [1928] P. 102.

1928. June 11. *Hon. Stafford Cripps K.C.* and *Wightman Powers* for the appellants. The language of s. 3 of the Disused Burial Grounds Act, 1884, especially the use of the words "erect" and "upon," shows that a structure of the nature of that now proposed was not intended to be prohibited. In *Paddington Corporation* v. *Attorney-General* (2), in the House of Lords, Lord Halsbury said that the intention of the Act was to keep a disused burial ground "as a place of exercise, ventilation and recreation, and what not—to prevent anything

(1) [1893] P. 58. (2) [1906] A. C. 1.

being done in the nature of building which would interfere with or restrict the free and open use of these spaces." Each of the learned Lords referred with approval to the judgment of Buckley J. at the trial, who said, " the public right is to have the open space so kept as to allow the enjoyment of the public of the space in an open condition, free from buildings " : *Boyce* v. *Paddington Borough Council.* (1) The evidence in the present case shows that the proposed user would not at all interfere with the rights of the public above referred to. The word " erect " in relation to a building or structure primarily indicates a work above the surface : *Baird* v. *Tunbridge Wells Corporation.* (2) [Reference was made also to *Graham* v. *Newcastle-on-Tyne Corporation* (3) and *Vicar of St. Botolph* v. *Parishioners of Same.* (4)] Further, faculties were granted authorizing the user of this and other disused burial grounds for purposes similar to those now proposed in four cases reported as *In re St. Nicholas Cole Abbey.* (5) Those decisions, given thirty-six years ago, have not been challenged until this case ; relying upon them electrical undertakers have since constructed transformer chambers in disused burial grounds. Great inconvenience to electrical undertakings and to the public will occur if a different view of the law is now taken. In the above circumstances the decisions of 1893 should be upheld : *Pugh* v. *Golden Valley Ry. Co.* (6) and *Bourne* v. *Keane.* (7)

Hon. Sir Malcolm Macnaghten K.C. and *S. G. Turner* for the respondents were not called upon.

June 25. The judgment of their Lordships was delivered by

LORD HAILSHAM L.C. This is an appeal by the Rector and Churchwardens of the Parish of St. Nicholas Acons, in the City of London, against an order made on January 24, 1928, by the Dean of the Arches, dismissing an appeal from an order made by the Chancellor of the Consistory Court of

(1) [1903] 1 Ch. 109, 113, 114.
(2) [1894] 2 K. B. 867, 884.
(3) (1892) 9 Times L. R. 130.
(4) [1900] P. 69.
(5) [1893] P. 58.
(6) (1880) 15 Ch. D. 330, 334.
(7) [1919] A. C. 815, 924.

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London, and refusing to decree a faculty authorizing the appellants to enter into an agreement with the City of London Electric Lighting Company, Ld., for the construction of a transformer chamber in the churchyard of the parish. There was no opposition to the application upon its merits, but the respondents, the London County Council, objected to the grant of the faculty in pursuance of their statutory duty on the ground that the proposed transformer chamber would infringe the provisions of s. 3 of the Disused Burial Grounds Act, 1884, and that on that ground there was no jurisdiction to grant it.

From the evidence it appears that the Parish Church of St. Nicholas Acons was destroyed in the Great Fire, and has never been rebuilt; and that the churchyard was closed for burials by Order in Council in the year 1854 and has since that date been kept as a private open space enclosed by railings. It further appears that the City of London Electric Lighting Company, Ld., is an electricity undertaking supplying electricity for lighting and other purposes to a large number of persons in the City. For the purpose of its undertaking the company had erected a transformer chamber in Nicholas Lane; and in the year 1892 the company was granted a licence to use a portion of the churchyard for the building of an entrance to the said transformer chamber, and for railing off the entrance from the rest of the churchyard. This licence was granted for a period of twenty-one years by virtue of a faculty decreed by Chancellor Tristram on April 6, 1892, and was renewed for a further period of twenty-one years by virtue of a faculty granted in March, 1914. Since the grant of the licence the use of electricity has very largely increased; and evidence was called to prove that it was essential in order to supply the public need that the transformer chamber should be enlarged and that there was no site available for the enlargement except the churchyard.

The transformer chamber which it is proposed to place in the churchyard is described in the judgment of the learned Chancellor as (1): "A brick-built structure with a roof of

(1) [1928] P. 104.

asphalt supported by wrought steel girders and by reinforced concrete. That roof is under the surface of the churchyard and the only parts of the transformer chamber which will, so to speak, emerge in the churchyard are two ventilators, which, I think, are something like nine inches above the surface of the churchyard, and they will be practically concealed from sight by certain beds of flowers which the Company undertake to place there. So far as noise is concerned, there will be no noise connected with the machines which are used in the transformer chamber; they are, in fact, as I understand, motionless machines..... So what is contemplated is a chamber mainly under the churchyard, but with two ventilator lights just above the surface, and containing noiseless machinery, machinery which is simply used for transforming current."

The relevant section of the Disused Burial Grounds Act, 1884, is in these terms :—

"Section 3: After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground, except for the purpose of enlarging a church, chapel, meeting house, or other places of worship."

It was not disputed that the churchyard in question is a disused burial ground within the meaning of the Act. For the appellants it was contended that the construction of this transformer chamber would be of great public advantage; that it was so designed as not to interfere with the use of the churchyard as an open space; that the grant of the licence would add materially to the revenue of the church; and that a necessary consequence of the decision appealed against, if upheld, would be that the faculties already granted in this and other cases were ultra vires, a conclusion which might lead to much public inconvenience. Many of these considerations are matters eminently proper to be considered by Parliament upon an application to amend the law; but they can have very little relevance to the question of law which their Lordships have to determine.

The first question which has to be considered is whether the proposed transformer chamber is a building. Having regard to the nature of the structure as described above

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their Lordships can entertain no doubt that that question must be answered in the affirmative, and, indeed, this was not seriously contested on behalf of the appellants. But the appellants' counsel contended that even if the chamber were a building it would not be a "building erected upon" the churchyard. It was argued that this expression must be limited to buildings raised substantially above the ground level and interfering with the use of the churchyard for the purposes of an open space. In their Lordships' view the language of the statute cannot be so limited. The erection of the building is commenced as soon as the foundation has been excavated, and a building is erected upon the site upon which it is built none the less because no part of it is raised above the ground level as existing at the date of its erection. It was argued that this view was inconsistent with the decision of the House of Lords in the case of *Paddington Corporation* v. *Attorney-General*. (1) In that case the borough council sought to erect a screen in a disused burial ground in order to prevent adjoining houses from acquiring an easement of light. The House of Lords held that a screen erected for such a purpose would not necessarily be a building; but their Lordships find nothing in the language of the judgments to support the limited construction sought to be put upon the statute by the appellants in the present case. It was further contended for the appellants that, since faculties had been granted in the year 1892 in this and other cases, their Lordships ought to treat the law as settled by these decisions and ought not now to disturb them. The cases in which faculties were granted are reported in the Law Reports under the heading *In re St. Nicholas Cole Abbey* (2), and in the note to that case. These were all unopposed petitions and in none of them was the Disused Burial Grounds Act, 1884, referred to, either in argument or in the judgment. The learned Chancellor appears to have treated the grant of the licence in the case of St. Nicholas Acons as being equivalent only to the grant of an easement of a right of way, and to have held that on that ground there was jurisdiction to make the order. The question

(1) [1906] A. C. 1. (2) [1893] P. 58.

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whether the entrance to the transformer chamber then sanctioned constituted a building erected on the churchyard was never discussed or decided. Their Lordships are quite unable to treat a decision in an unopposed case without any reference to the Act of Parliament authorizing the grant of a licence for a limited period as a decision which determines the construction to be put upon the Act of Parliament or as a factor which should in any way affect their Lordships' judgment upon the question of construction now that it is before them.

It follows that, in their Lordships' opinion, this appeal fails and should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Phillips, Son & Rollinson.*
Solicitor for respondents: *T. Bullivant.*

[PRIVY COUNCIL.]

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June 19.

ATTORNEY-GENERAL FOR ALBERTA . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA . RESPONDENT.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Escheats—Bona Vacantia—Rights of Dominion and Province—Legislative Power of Province—Ultimate Heir Act, 1921 (*R. S. Alta.*, 1922, *c.* 144)—*Land Titles Act,* 1894 (57 *&* 58 *Vict. c.* 28, *Dom.*), *s.* 5—*Alberta Act,* 1905 (4 *&* 5 *Edw.* 7, *c.* 3, *Dom.*), *ss.* 3, 21—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 109; *s.* 92, *head* 13.

Lands in Alberta granted by the Crown either before or after September 1, 1905, when the Alberta Act came into force, in the absence of heirs, escheat to the Crown in the right of the Dominion.

The Land Titles Act, 1894 (Dom.), and the Land Titles Act, 1906 (Alta.), which provided for registration of titles, and that land certificated thereunder should be dealt with as personal estate upon the

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* *Present:* LORD HAILSHAM L.C., VISCOUNT HALDANE, LORD BUCKMASTER, LORD WRENBURY, and LORD WARRINGTON OF CLYFFE.

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death of the owner, had not the effect of altering the tenure of the land, nor, where the Crown was the grantor, of enlarging the ordinary ambit of the grant.

Trusts and Guarantee Co. v. *The King* (1917) 54 Can. S. C. R. 107 approved.

The word "royalties" in s. 21 of the Alberta Act, which provided that "all Crown lands, mines, and minerals and royalties incidental thereto" should continue to be vested in the Crown for the purposes of Canada, includes escheats; that is so whenever the lands were granted, as the words "lands, mines, and minerals" include all the interest of the Crown therein.

Attorney-General of Ontario v. *Mercer* (1883) 8 App. Cas. 767 applied.

Bona vacantia in Alberta belong to the Crown in the right of the Province. Reading the whole of the Alberta Act together, the effect of s. 3 was to place the Province of Alberta in the same position in regard to property as the Provinces previously constituted save so far as the Act provided otherwise, either expressly or by reasonable implication.

The Ultimate Heir Act (R. S. Alta., 1922, c. 144), which provided that the University of Alberta should be the ultimate heir of property in the Province upon failure of descent, is ultra vires so far as it purported to affect real property. The Act is in substance one designed to defeat the right of the Crown reserved by s. 21 of the Alberta Act, and not an exercise of the legislative authority of the Province in relation to the law of inheritance.

In re Stone [1924] S. C. R. 682 distinguished.

Judgment of the Supreme Court of Canada [1927] S. C. R. 136 affirmed.

CONSOLIDATED APPEAL and CROSS-APPEAL (No. 157 of 1926) by special leave from a judgment of the Supreme Court of Canada (April 20, 1927) varying a judgment of the Appellate Division of the Supreme Court of Alberta (February 1, 1926).

The case giving rise to the consolidated appeal came before the Appellate Division of the Supreme Court of Alberta as a consolidation of three applications by administrators for directions upon questions arising in the administration of the estates of three deceased persons. The Attorney-General for Canada and the Attorney-General for Alberta intervened.

The case raised questions as to the rights of the Dominion and of the Province respectively in escheats and bona vacantia in the Province, and the further question whether the Ultimate Heir Act (Alb. 1921, c. 11, and R. S. Alta., 1922, c. 144) was ultra vires.

The provisions of the British North America Act, 1867, s. 109, and of the Alberta Act, 1905 (Dom.), ss. 3, 23, which

were material to the questions raised, as well as the essential provisions of the Ultimate Heir Act, are fully set out in the judgment of the Judicial Committee.

The following questions were submitted to the Appellate Division :—

1. Do lands situated in the Province of Alberta granted by the Crown since September 1, 1905, when the Alberta Act (4 & 5 Edw. 7, c. 3) came into force, which have escheated for want of heirs or next of kin escheat to the Crown in the right of the Dominion or in the right of the Province ? 2. Do escheated lands in the Province of Alberta granted by the Crown prior to September 1, 1905, which have not become Crown lands by escheat or otherwise prior to that date, escheat to the Crown in the right of the Dominion or in the right of the Province ? 3. Does personal property situated in Alberta of persons domiciled in Alberta and dying intestate since September 1, 1905, without next of kin go to the Crown as bona vacantia in the right of the Dominion or of the Province ? 4. Is c. 11 of 1921 (Alberta), now the Ultimate Heir Act, R. S. Alta., 1922, c. 144, ultra vires in whole or in part ?

The Appellate Division answered the first of the above questions in favour of the Dominion, the second and third in favour of the Province, and in answer to the fourth held that the Ultimate Heir Act was intra vires. The reasons of the majority of the learned judges, and of Ives J. who dissented, appear in a report of the proceedings at 22 Alb. L. R. 186.

The Attorney-General for Canada appealed from the judgment, so far as it upheld the contentions of the Province, to the Supreme Court of Canada.

The appeal was heard by Anglin C.J., and Idington, Duff, Mignault, Newcombe, and Rinfret JJ., of whom Idington J. did not take part in the judgment. The judgment of the Court, delivered by Duff J., held, as to question 2, that escheated lands granted before September 1, 1905, like those granted after that date, escheated to the Crown in the right of the Dominion ; and, as to question 4, that the Ultimate Heir Act was ultra vires so far as it affected real estate. The appeal is reported at [1927] S. C. R. 136.

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The Attorney-General for Alberta appealed to the Privy Council by special leave, and the Attorney-General for Canada cross-appealed from so much of the judgment as held that bona vacantia belonged to the Province, and from the limitation of the invalidity of the Ultimate Heir Act by the words "in so far as it affects real estate." The appeal and cross-appeal were consolidated.

1928. May 7, 8, 10, 11. *O. M. Biggar K.C.* and *Hon. Geoffrey Lawrence K.C.* for the Attorney-General for Alberta. The effect of s. 3 of the Alberta Act was to apply to the Province the provisions of s. 109 of the British North America Act, 1867, as if Alberta "had been one of the Provinces originally united," subject only to such variations as the Alberta Act introduced. Consequently escheats belong to the Province, as decided by the Board in *Attorney-General of Ontario* v. *Mercer* (1), unless s. 21 of the Alberta Act provides otherwise. To ascertain the true effect of that section it is necessary to consider the position as to Crown lands when the Act was passed. Since 1867 legislation had provided for the administration of ungranted Crown lands in the territory out of which Alberta was formed. The Land Titles Act, 1894 (Dom.), provided, by s. 5, that land granted and patented thereunder should descend as personal estate, and by s. 114 that the personal representative of a patented owner on his decease could himself obtain a certificate, which, by s. 117, was to be conclusive against the Crown. That Act was replaced by the Land Titles Act, 1906 (Alta.), which was in similar terms. Sect. 21 of the Alberta Act did not apply to Crown lands which had already been granted, because they had already been "administered" in accordance with the Act of 1894, and had ceased to be Crown lands within the meaning of s. 21; that view is supported by the use of the word "continue" in s. 21. Having regard to s. 20, Crown lands meant the "public land." So too upon Crown lands being granted after September 1, 1905, they were thereby "administered," and s. 21 ceased to apply to them. [Reference

(1) 8 App. Cas. 767.

was made to *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1) and *Attorney-General of British Columbia* v. *Attorney-General of Canada.* (2)] This construction of s. 21 does not exclude the reservation of precious metals, because, applying the word "Crown" to each of the nouns which follow, precious metals are reserved without resort to the word "royalties." With regard to bona vacantia, there was nothing in the Alberta Act to take them out of the operation of ss. 102 and 109 of the British North America Act, 1867. Therefore under the decision of the Board in *Rex* v. *Attorney-General of British Columbia* (3) they belonged to the Province. But whether escheats and bona vacantia vested in the Crown in the right of the Dominion or of the Province, the Ultimate Heir Act was intra vires. The Act regulated the course of inheritance of property in the Province, a matter within the exclusive power of the Provincial Legislature under the British North America Act, 1867, s. 92, head 13: *In re Stone.* (4)

Macmillan K.C. and *J. B. McBride* (*T. Mathew* with them) for the Attorney-General for Canada. The Land Titles Act, 1894, did not abolish the right of escheat. It was an Act dealing with registration of titles; it would be odd if it had the effect of altering the tenure of Crown lands so that they were thenceforth held allodially. Sect. 2, sub-s. 24, refers to Crown grants being made "in fee," i.e. not allodially. On this point the reasoning of Idington J. in *Trusts and Guarantee Co.* v. *The King* (5) is adopted. The legislation of 1905 did not transfer to the Province the rights of escheat and bona vacantia which undoubtedly had previously been vested in the Dominion. The position of Alberta at its constitution as a Province differed from that of the Provinces as to which the Board has hitherto considered the rights to escheats and bona vacantia. They were Crown colonies previously to their constitution as Provinces and owned lands and royalties. Alberta owned no lands or royalties either in 1867 or in 1905. The land out of which the Province was

(1) (1888) 14 App. Cas. 46, 56.
(2) (1889) 14 App. Cas. 295, 305.
(3) [1924] A. C. 213.
(4) [1924] S. C. R. 682.
(5) 54 Can. S. C. R. 107, 124 et seq.

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carved belonged to the Hudson Bay Company until 1870, when it was transferred to the Dominion. Sects. 19 to 21 of the Alberta Act show that the Province was created with differences distinguishing it from the original Provinces. Sect. 109 of the British North America Act, 1867, expressly applies only to lands, etc., "belonging to the several Provinces." If, however, s. 109 applies save so far as it is varied, s. 21 of the Alberta Act varied it so far as escheats are concerned. As in *Mercer's* case (1) "royalties" includes escheats; the right of escheat was incident to the Crown lands whenever they were granted. It was not necessary in the Alberta Act to deal with bona vacantia expressly. The rights therein could be taken away from the Dominion only by express words having regard to s. 16 of the Interpretation Act; there arose no "necessary and unavoidable" implication by having the effect contended for. The Ultimate Heir Act was wholly ultra vires. The real nature of the legislation must be looked to: *Attorney-General for Ontario* v. *Reciprocal Insurers.* (2) Though ostensibly an Act dealing with succession, it was in its real nature an Act to divert the rights of the Crown from the Dominion to the Provinces.

O. M. Biggar K.C. replied.

June 19. The judgment of their Lordships was delivered by

LORD BUCKMASTER. The questions raised on these appeals are whether the Crown possesses in the right of the Dominion of Canada the title to (1.) escheated lands and (2.) bona vacantia within the Province of Alberta. The Supreme Court of Canada has decided the first question in the affirmative and the second in the negative. The appeal by the Attorney-General of Alberta is against this judgment on the first point and the cross-appeal of the Attorney-General of Canada upon the second.

The Province of Alberta was created pursuant to the British North America Act of 1871 by a statute of the Dominion passed in 1905 (4 & 5 Edw. 7, c. 3) called the Alberta Act. Before its constitution and apart from the

(1) 8 App. Cas. 767. (2) [1924] A. C. 328, 337, 338.

effect of the Land Titles Act of 1894, there is no real dispute on this appeal as to the title of the Crown in right of the Dominion to escheated properties and bona vacantia in the territories that now form part of the Province.

The main features of the present dispute are, first, the effect of the Land Titles Act of 1894; secondly, that of the Alberta Act; and thirdly, whether the Province had power to deal with the property in question.

The actual statute by which the Province have purported to exercise the rights they claim is an Act entitled the Ultimate Heir Act, passed in 1921, the essential provision of which is in the following terms: "(1.) When any person dies intestate in fact in respect of lands situate in the Province of Alberta, or being domiciled in Alberta dies intestate in respect of any moveable property or chose in action, and no person or corporation is otherwise than under the provisions of this Act entitled thereto as the heir or next-of-kin of the intestate, then the latter shall be deemed to have made a duly executed and entirely valid will, devising or bequeathing such land, moveable property or chose in action to the body corporate known as the Governors of the University of Alberta." It is this provision that has been held ultra vires so far as it relates to lands by the Supreme Court of Canada.

The facts that have given rise to this dispute are the deaths of three people named Wudwud, Malesko and Stevenson, who were domiciled in the Province of Alberta, and died respectively on June 24, 1918, April 24, 1921, and November 8, 1919, leaving both lands and goods without heirs or next of kin. The administrators of the several estates made applications to the Supreme Court of Alberta for advice as to their distribution, alleging that no heir, next of kin or other person entitled to the property of the deceased had been found.

The three applications having been consolidated, the Appellate Division of the Supreme Court of Alberta, Ives J. dissenting, declared the Ultimate Heir Act to be valid and to apply to the real and personal property of any intestate such as Malesko, who died after that Act came into force,

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In respect of the estates of Wudwud and Stevenson, who died after the constitution of the Province on September 1, 1905, and before the Ultimate Heir Act came into force, the Court directed (*a*) that personal property was to be distributed as bona vacantia to His Majesty in the right of the Province, and (*b*) that lands granted by the Crown after September 1, 1905, were to be distributed to His Majesty in the right of the Dominion. The Court also declared that, apart from the provisions of the Ultimate Heir Act, lands such as Stevenson's, granted before September 1, 1905, and escheating after that date, were distributable to His Majesty in the right of the Province. The question of the property being chargeable with the debts of the deceased was left undecided with liberty to apply. On appeal to the Supreme Court of Canada this judgment was affirmed only as to (*b*) and as to the personal estate.

It follows from this statement that the Land Titles Act, 1894, first needs consideration. This Act replaced earlier legislation on the same subject and was, after the constitution of the Province, repealed as to Alberta, its terms being reproduced in a Provincial statute known as the Land Titles Act, 1906. It was an Act for the registration of title, and provides that a certificate of title granted pursuant to the statute shall be conclusive evidence as against His Majesty and all persons whomsoever that the person named on such certificate is entitled to the land included therein. It also provides that upon death of the owner of any land for which a certificate has been granted, the land shall vest in the personal representative of the dead owner, who upon a memorandum of probate or letters of administration being entered in the Register shall be deemed to be the owner of the land, and by s. 5 it is enacted that the land should descend to the personal representative in the same manner as personal estate and be dealt with and distributed as personal estate. The argument of the appellants upon this Act is that the ownership effected by grant from the Crown followed by registration destroys the right of the Crown to escheated lands, and, further, that in order to assimilate the descent

of real and personal estate it is necessary to exclude the right of escheat. Their Lordships think that this argument cannot be sustained. There is nothing in the statute to support the theory that on the registration of the title to land for the first time the character of the tenure under which it was originally held was changed, so that in case of the Crown being the grantor, the effect of the Act was to enlarge the ordinary ambit of the grant.

The reasoning of Anglin J. in *Trusts and Guarantee Co.* v. *The King* (1) upon this point, with which their Lordships agree, renders further elaboration unnecessary.

It is obvious that the title of the personal representative can be no greater than that of the owner whose estate he holds, and the provision as to the descent of land as personal estate does not affect the question, for escheated lands have not descended, and whether they can be sold and used for payment of debts, which has been left open, is not material, for even if they were so liable, to the extent to which they were not needed for this purpose they would still remain the subject of escheat, and though they might have been actually converted they would for this purpose retain the quality of real property by analogy to the doctrine of *Ackroyd* v. *Smithson.* (2)

Turning now to the Alberta Act of 1905, it is necessary to consider this in relation to the British North America Act of 1867. This Act united the Provinces of Canada, Nova Scotia and New Brunswick, each of which possessed separate legislatures at the time of the Union. It divided the Province of Canada into two Provinces, Ontario and Quebec, and gave to each Provincial legislature the right to make laws with regard to property and civil rights within the Province.

By s. 109 it was provided: "All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals or royalties, shall belong to the several Provinces of Ontario, Quebec,

(1) 54 Can. S. C. R. 107, 124 et seq. (2) (1780) 1 Bro. C. C. 503.

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Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any interest other than that of the Province in the same."

The territory out of which the Province of Alberta is constituted was unaffected by this section, but on the admission of the North West Territories into the Dominion of Canada in 1870 and the passing of the British North America Act, 1871, became subject to the laws of the Parliament of Canada. It therefore followed that the Province could never, apart from statute, be in the position of owning lands, mines, minerals and royalties.

Sect. 3 of the Alberta Act of 1905, however, made the provisions of the British North America Acts applicable to the Province of Alberta in the following words: "The provisions of the British North America Acts, 1867 to 1886, shall apply to the Province of Alberta in the same way and to the like extent as they apply to the Provinces heretofore comprised in the Dominion, as if the said Province of Alberta had been one of the Provinces originally united, except in so far as varied by this Act, and except such provisions as are in terms made, or by reasonable intendment, may be held to be specially applicable to or only to affect one or more and not the whole of the said Provinces."

By s. 21 an exception in favour of Crown lands was made in the following terms: "All Crown lands, mines, and minerals and royalties incident thereto, and the interest of the Crown in the waters within the province under the North West Irrigation Act, 1898, shall continue to be vested in the Crown and administered by the Government of Canada for the purposes of Canada, subject to the provisions of any Act of the Parliament of Canada with respect to road allowances and roads or trails in force immediately before the coming into force of this Act, which shall apply to the said province with the substitution therein of the said province for the North-West Territories."

"Royalties," within the meaning of s. 109 of the British North America Act of 1867, has been held in the case of the

Attorney-General of Ontario v. *Mercer* (1) to include escheats. The reasoning of that case was this: that an escheat is essentially a royalty, and the only difficulty lay in deciding whether the interposition of the words "mines and minerals" after the word "lands" was not sufficient to deprive the word "royalty" of its proper force. It was there declared that these words did not have that effect, and, in consequence, the escheated lands were included in the provisions of s. 109 of the British North America Act, 1867, and belonged to the Crown in the right of the Province. The difference in the language between s. 21 of the Alberta Act and s. 109 of the British North America Act is not, in their Lordships' opinion, sufficient to warrant any real distinction in effect. The royalties must in the latter, as in the former, case be taken to include escheats, and these are reserved to the Crown for the purposes of Canada. This conclusion applies to all lands whenever granted, for the argument that the royalties reserved were only those in relation to lands then held as Crown lands cannot be maintained, in the words of Duff J.: "Crown lands, mines and minerals" does not necessarily import "lands, mines and minerals" held by the Crown in full proprietorship, it may be read as including all interests of the Crown "in lands, mines and minerals within the Province," and this their Lordships think is the correct interpretation.

Considering now the case of bona vacantia, it is plain that they are unaffected by this argument. They are not incident to Crown lands, mines or minerals, and are therefore not included in the reserved property mentioned in s. 21. The Attorney-General for Canada, however, argues that they cannot belong to the Province, since they never had so belonged before the Province was constituted, and there is nothing in the Act of 1905 to confer such a title. Their Lordships think that this argument does not do justice to the fundamental provisions of s. 3 of the Alberta Act. Reading the whole Act together they regard the effect of this section as placing the Province of Alberta in the same position

(1) 8 App. Cas. 767.

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as the other Provinces in regard to property, except as varied by the statute, either by express terms or reasonable implication. Sect. 21 is only sensible on this hypothesis, for unless it was assumed that it was required for the purpose of preserving the Crown rights in the property to which it relates, it would be meaningless, but if that be once assumed it follows that the property to which it does not relate is vested in the Crown, not for the purposes of Canada, but for the purposes of the Province of Alberta.

They therefore are of opinion that the cross-appeal of the Attorney-General for Canada fails.

There remains the question of the power of the Province to affect the title to the escheated lands by virtue of their authority to make laws relating to property and civil rights within the Province. This right confers no power to deal directly with public property, which is expressly reserved by s. 91, head 1, to the Parliament of Canada. An Act, therefore, to declare that such property should vest in His Majesty in his right of Alberta would be void. This direct attack was indeed made by the Legislature of Alberta by an Act of 1915, c. 5, which was declared to be ultra vires by a judgment of the Supreme Court in *Trusts and Guarantee Co.* v. *The King.* (1) This judgment was a majority judgment, from which Idington and Brodeur JJ. dissented, but their Lordships think that the decision of the Supreme Court was right. The argument against the Act was most accurately stated in the following words of Fitzpatrick C.J. (2): "Judgment for the respondent on this appeal does not involve any decision as to the rights of the legislature of the province to change the laws of inheritance. Lands escheat to the Crown for defect of heirs and this has nothing to do with the question who are a person's heirs. But altering the law of inheritance is one thing and appropriating the right of the Dominion on failure of heirs is quite another thing."

The Act now in dispute, passed in 1921 by the Provincial Legislature, proceeded on different lines to reach the same

(1) 54 Can. S. C. R. 107. (2) 54 Can. S. C. R. 110.

goal. It provided that the University of Alberta should be the ultimate heir to all property where descent failed. This it is sought to justify upon the ground that the Province had power to alter succession and could impinge upon the Crown rights by introducing illegitimate or adopted children into the line of succession; that as to the former this had been done, and the provision held valid so far as Saskatchewan was concerned, a Province with similar rights to the Province of Alberta, in the case of *In re Stone*. (1)

Their Lordships think that the conclusion in that case may be safely accepted. The Provincial Government's power to control succession may be thus exercised provided that the statute is, when fairly regarded, designed solely for this end, but when under user of this power the Legislature attempts to defeat the Crown rights expressly reserved they have passed on to forbidden ground and cannot justify their intrusion by a colourable pretext for their acts.

The cases summarized in the judgment of Duff J. in the case of *Attorney-General for Ontario* v. *Reciprocal Insurers* (2) show that where collision between the rights of the Provincial and Dominion Parliaments arise under any statute the real purpose of the Act must be regarded in forming an opinion as to the validity of the statute. To use the words of the judgment referred to: "Where the lawmaking authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing."

In the present case, while the University of Alberta exists, and it is to be hoped it will continue for a time that knows no measurable limit, the right of the Crown is completely defeated. It is not by varying or extending the ordinary rules of succession that this is accomplished, but by introducing outside all natural, lawful or conventional descendants or relations of a deceased an entirely foreign beneficiary and one in part, at least, dependent on the Provincial revenues.

(1) [1924] S. C. R. 682. (2) [1924] A. C. 328, 337, 338.

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There is no real difference in substance, and only partially in effect, between this and the Act of 1915, and in their Lordships' opinion it is equally open to objection.

For these reasons they are of opinion that the appeal must fail and both the appeal and the cross-appeal should be dismissed without costs, and they will humbly advise His Majesty accordingly.

Solicitors for Attorney-General for Alberta: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

[PRIVY COUNCIL.]

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BÉLANGER . . . . . APPELLANT;

AND

FRASER . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH FOR THE PROVINCE OF QUEBEC.

Canada (Quebec) — Prescription — Possession for Thirty Years — Alleged fraudulent Concealment of Title—Civil Code, art. 2242.

Under art. 2242 of the Civil Code of Quebec continuous and unequivocal possession for thirty years by a defendant and his predecessors gives rise to a title by prescription, even if they knew of and have fraudulently concealed the right and title of the plaintiff and his predecessors. Judgment of the Court of King's Bench Q. R. 43 K. B. 1 affirmed.

APPEAL (No. 32 of 1928) from a judgment of Court of King's Bench for the Province of Quebec (April 20, 1927) affirming a judgment of the Superior Court of that Province.

* *Present:* LORD HAILSHAM L.C., VISCOUNT DUNEDIN, VISCOUNT SUMNER, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

The appellant, Dame Hermine Bélanger, brought in 1925 an action in the Superior Court to recover from the respondent a portion of a seigniory in the Province. The defendant pleaded that since 1755 she and her predecessors had been in continuous, peaceable, and unequivocal possession, and that in consequence she had a good title by prescription.

The appellant by her answer alleged reasons in opposition to the plea of prescription. The reasons were contained substantially in para. 28 (*e*), which was as follows: "Les auteurs des défendeurs ont toujours su que les auteurs de la demanderesse avaient droit à la propriété de ladite seigneurie, et s'ils sont demeurés en possession de ladite seigneurie [Verbois, pendant plus de cent ans, c'est parce qu'ils ont agi de manière à cacher les titres et les droits des demandeurs et leurs auteurs, agissant ainsi frauduleusement."

The respondent demurred to the answer by an inscription in law asserting that in order to enjoy the benefits of prescription it was unnecessary to establish any title or to show that the possession was in good faith, or without knowledge of the appellant's title.

Art. 2242 of the Civil Code provides: "All things, rights and actions the prescription of which is not otherwise regulated by law, are prescribed by 30 years, without the party prescribing being bound to produce any title, and notwithstanding any exception pleading bad faith."

The inscription in law was maintained in the Superior Court by Boyer J., and his judgment was unanimously affirmed on appeal to the Court of King's Bench. The learned judges pointed out that under the express terms of art. 2242 there was no need of good faith in order that prescription might run in favour of the possessors. It was true that a prescription commencing before 1866 was by art. 2270 made subject to the previously existing law, but art. 118 of the Coutume de Paris shows that art. 2242 made no change in the previously existing law; further, in the present case there had been thirty years' possession since 1866.

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1928. July 13. *Masson* for the appellant. For the purpose of this case the facts alleged in para. 28 (*e*) of the answer must be taken as established. In several cases, e.g. *Toupin* v. *Jodoin* (1), it has been held in Quebec that a fraudulent possession cannot give rise to a title by prescription. The words "bad faith" in art. 2242 mean merely some knowledge of another's rights, and do not include fraudulent concealment of another's title: Planiol, Droit Civil, vol. i., s. 906. Further, ignorance of title resulting from fraud constitutes an "impossibility to act," and is thus excepted by art. 2232. That article embodies the maxim "Contra non valentem agere non currit prescription": *City of Montreal* v. *Cantin* (2); under that maxim the old law of Quebec treated ignorance resulting from fraud as causing a suspension of possession for the purpose of prescription: Planiol, vol. i., s. 1488. The old law applies, because the defendant, who had not herself been in possession for thirty years, succeeded to a title which commenced prior to 1866.

Lafleur K.C. and *A. P. Grigg* for the respondent were not called upon.

The judgment of their Lordships was delivered by

Lord Hailsham L.C. In this case the appellant sought to recover possession of certain property which she alleged was acquired by her ancestor in the year 1734, and of which the respondent or her predecessors in title are alleged to have been in possession for 170 years.

The respondent by her defence raised the point that she had obtained a prescriptive title by reason of her possession. To that the appellant replied that the prescription did not run, because the respondent and her predecessors in title had wrongfully and fraudulently concealed from the appellant and her predecessors the existence of the title deeds and the right which the appellant's ancestor had acquired; therefore, that that fraud prevented the respondent from invoking the doctrine of prescription.

(1) (1921) Q. R. 60 S. C. 398. (2) [1906] A. C. 241, 246.

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On that reply the case was set down for argument on the point of law whether that paragraph in the reply should be struck out as irrelevant. The Courts in Quebec have upheld the objection and ordered the paragraph to be struck out, and it is from that order that the present appeal is brought.

Their Lordships have carefully considered the relevant sections of the Code and the judgments dealing with the matter. The points have been quite clearly placed before them by Mr. Masson on behalf of the appellant, and their Lordships are satisfied that the provisions of the Civil Code of Quebec do govern the matter which has to be determined. They regard the language of those sections as being quite plain and as applying to the case in question.

For these reasons, which are really the reasons embodied in the judgments, their Lordships are of opinion that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Lawrence Jones & Co.*
Solicitors for respondent: *Blake & Redden.*

[PRIVY COUNCIL.]

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INGLEWOOD PULP AND PAPER COMPANY, LIMITED . . . . . } APPELLANTS;

AND

NEW BRUNSWICK ELECTRIC POWER COMMISSION . . . . . } RESPONDENTS.

[AND CROSS-APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Compensation—Expropriation—Right to Interest—New Brunswick Electric Power Act, 1920 (10 *Geo.* 5, *c.* 53, *N. B.*).

Upon the expropriation of land under statutory power, whether for the purpose of private gain or of good to the public at large, the owner is entitled to interest upon the principal sum awarded from the date when possession was taken, unless the statute clearly shows a contrary intention.

Judgment of the Supreme Court of New Brunswick affirmed.

APPEAL and CROSS-APPEAL (Nos. 147 and 148 of 1927) from a judgment of the Appellate Division of the Supreme Court of New Brunswick (April 22, 1927) varying an award by Le Blanc J. certifying the amount of compensation payable by the above Power Commission to the above company in respect of lands expropriated under the New Brunswick Electric Power Act, 1920.

The facts, and the effect of the award and of the judgment on appeal, appear from the judgment of the Judicial Committee.

The provisions as to compensation under the above Act are contained in s. 10, sub-ss. 8–10.

1928. July 25, 26, 28. *F. R. Taylor K.C.* and *H. A. Porter* for the Inglewood Company.

J. B. M. Baxter K.C. and *J. B. P. Lewin* for the Power Commission.

* *Present:* LORD HAILSHAM L.C., VISCOUNT SUMNER, LORD WARRINGTON OF CLYFFE, LORD ATKIN, and CHIEF JUSTICE ANGLIN.

July 20. The judgment of their Lordships was delivered by

LORD WARRINGTON OF CLYFFE. This is an appeal from an order of the Appeal Division of the Supreme Court of New Brunswick dated April 22, 1927, varying in certain particulars, but otherwise affirming, an award of Le Blanc J. sitting as an arbitrator under the New Brunswick Electric Power Act, 1920 (10 Geo. 5, c. 53).

There is also before the Board a cross-appeal (brought by leave) against so much of the order of the Appeal Division as varied the award in the appellants' favour and against that part of the same order which directed the respondents to pay interest on the principal sum awarded.

The award was made on a claim by the appellants for compensation in respect of certain lands expropriated by the respondents for the purpose of their statutory undertaking.

The respondents are virtually a department of the Province of New Brunswick, and were incorporated by the Act above referred to for the purpose of constructing, maintaining and operating works, machinery and plant for generating electrical energy from (amongst other things) water power and for transmitting the same. They were given extensive powers of expropriation, and it is not disputed that such powers were validly exercised in the present case.

With regard to compensation, it was provided that a notice specifying generally the property taken, and signed as directed by the Act, should be filed in the office of the Registrar of Deeds for the county in which the property is situate, and such property should thereupon become and remain vested in the Commission, and after the filing of such notice, a notice should be served upon the owner of the property which should contain (*a*) a designation of the matter or thing so to be taken sufficient to identify the same, and (*b*) a declaration of willingness to pay some certain sum as compensation for such matter or thing so to be taken. This notice was to be accompanied by the certificate of a sworn surveyor or civil engineer disinterested in the matter to the effect (amongst other things) that he knows the land, matter or thing taken and the amount of damage likely to arise from the exercise

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of the powers, and that the sum offered is fair compensation for the land taken and for the damages aforesaid. It was further provided that, in default of acceptance of the sum offered within the time fixed by the Act, the Commission might, in such a case as the present, apply for the assessment of damages to a judge of the Supreme Court, and upon the application being made the judge should by order designate himself the sole arbitrator, and the judge so designated should thereupon become and be the sole arbitrator for determining the compensation to be paid. It was expressly enacted that if the sum awarded should not be greater than that offered, the costs of the arbitration should be borne by the owner.

An appeal was allowed upon any question of law or fact to the Appeal Division of the Supreme Court, and it was provided that upon the hearing of the appeal the Supreme Court, if the question were one of fact, should decide the same upon the evidence taken before the arbitrator as in the case of original jurisdiction.

The Musquash River, which flows into the Bay of Fundy, about seventeen miles south-west of the city of St. John, consists of two branches, the east branch and the west branch, which unite about seven miles above the river's mouth. Each branch in its course passes through some lakes, of which the principal is the Alva Lake, on the east branch.

The lands of the appellants expropriated by the respondents are part of a large area of wild forest land purchased by the appellants in or about the year 1901. The area was used by the appellants for lumbering purposes, and had no agricultural value. In the appellants' time the saw mills were driven by steam power, but there were upon the property certain old water power saw mills, and several dams had in former times been constructed, partly for the purpose of water storage in connection with these mills and partly as driving dams to float the logs to the mills. Some of these dams, or what remained of them, were in existence when the property was taken over by the respondents. All but two were much dilapidated. In 1903 a disastrous fire occurred, which destroyed

nearly all the timber, and there have been several fires since. The result is that in 1920, when possession of the expropriated land was first taken by the respondents, and for many years previously, the land had ceased to be used for the only purpose for which it was fitted. It is estimated that the property would not again become of value for lumbering purposes for at least fifty years and probably more.

The entire area consists of about 35,000 acres; the portion expropriated consists of 8,364.94 acres, and is in the main made up of the beds of the river and its tributaries and comparatively narrow strips of land on their banks. The whole of Lake Alva and the land on its shores is included. These portions are severed from the rest of the area, which thus loses such facilities for water transport as it previously enjoyed. The owners are also deprived of the fishing in the rivers and lakes included in the expropriated portion.

Pursuant to the provisions of the above mentioned Act, the respondents obtained the certificate of Mr. G. G. Murdoch, a sworn surveyor and civil engineer, disinterested in the matter. The amount stated by him to be in his opinion fair compensation for the land to be taken and for damages was $59,003.56, made up of the following items:—

8,364.94 acres at $2.50 per acre	$20,912.33
10 per cent. forcible taking	2,091.23
Standing timber estimated 200,000 sq. ft. at $5.00 a thousand	1,000.00
Severance, roads flooded and to be rebuilt in portions of property isolated	35,000.00
	$59,003.56

This sum was offered to the appellants and was not accepted. After some delay, owing to the death of the judge first designated, by an order dated November 27, 1924, Le Blanc J. designated himself sole arbitrator for determining the amount of compensation and damages to be paid.

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The arbitration opened on January 7, 1925, and lasted, with adjournments, over several months, during which time the arbitrator heard a large number of witnesses. He also, with the consent of both parties, viewed the property, and on October 30, 1926, he made his award in the form of an elaborate reasoned judgment. By this he awarded $42,500. made up as follows :—

8000 acres at 2.50 an acre	$20,000
10 per cent. for forcible taking	2000
Flooding of roads	3000
Damage to remainder of property on account of severance	17,500
	$42,500

The appellants appealed to the Appeal Division of the Supreme Court, which by their order dated April 22, 1927, varied the award as follows : (1.) By allowing a further sum of $900 with the addition of 10 per cent. for forcible taking for the 360 acres not allowed for by the arbitrator ; and (2.) by allowing $6000 for fishing rights, making the total amount awarded $49,490. The Court also allowed interest, refused by the arbitrator, on the said sum of $49,490 at the rate of 5 per cent. per annum from October 13, 1920. They gave the appellants the costs of the appeal, but ordered them to pay the costs of the arbitration.

The appellants appeal against this order, and contend (1.) that the sum awarded as compensation for the land is insufficient, inasmuch as the arbitrator did not award any sum in respect of the special advantages alleged to be enjoyed by reason of the possibility of use being made of the water power connected therewith ; (2.) that something ought to be allowed for the value of the property for the purposes of hunting and shooting ; and (3.) that the arbitrator was not justified in reducing the amount fixed by Mr. Murdoch in respect of damage by severance, and the Appeal Division ought to have so held.

The respondents, by the cross-appeal, seek to vary the order of the Appeal Division by omitting the sum allowed for fishing rights and by striking out the direction for payment of interest.

As to the first point raised by the appeal, the arbitrator and the judges of the Appeal Division have, as appears clearly from their judgments, rightly apprehended the law on this subject, and their Lordships therefore cannot find that the arbitrator has proceeded on an erroneous view of the law. He has found as a fact that on the evidence before him no value ought to be placed on such advantages, if any, as the land possessed as a water power site. There was much conflicting evidence on the point, and the arbitrator has, as he was clearly entitled to do, adopted the evidence given by witnesses for the respondents rather than that of the appellants' witnesses. Then having found that there were no special advantages on which a value could be placed, he has adopted the value placed on the land by Mr. Murdoch. It cannot be suggested that there was no evidence on which his finding could properly be based. There being no error in law and sufficient evidence to support the finding, it is clear that the Appeal Division were right in refusing to disturb it.

The arbitrator made a mistake as to the number of acres taken, and that has been properly corrected by the Appeal Division.

As to the complaint that no value has been placed on the land in respect of possible profits to be derived from the hunting and shooting, their Lordships do not see their way to interfere with the award. They think that the Appeal Division were right in their view that there was really no evidence on which such a claim could be founded. It would appear that there is abundance of land in the neighbourhood, shooting over which would be obtainable under an ordinary game licence, and it cannot be assumed that under such circumstances anything substantial would be paid for such a right over the appellants' land.

As to the amount allowed for severance, Mr. Murdoch, in the $35,000 which he estimated as the amount of damage

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from this source, in terms included the $3000 allowed by the arbitrator for flooded roads. It appears fairly plain that he also included any sum which might be attributed to the loss of fishing by the rest of the property being cut off from the lake and the rivers included in the part expropriated. Both these items are now allowed. The only question, then, is whether the arbitrator and the Appeal Division were bound to accept the remaining $8500 making up the $35,000. The question of the amount of damage is one pre-eminently for the arbitrator, and it is impossible to say that he was wrong in forming his own opinion and bound to accept Mr. Murdoch's figure.

Their Lordships are therefore of opinion that the appeal fails.

As to the cross-appeal :—

The arbitrator gave nothing for damage to the fishing rights. The Appeal Division, while agreeing that no case could be made for awarding compensation for the loss of salmon fishing, thought there was evidence that the fishing for trout and land locked salmon was of value, and assessed it at $6000. Their Lordships are of opinion that there was abundant evidence that this fishing was of some substantial value, and they can see no reason for interfering with the order of the Appeal Division as to the amount.

The last question is that of the allowance of interest, and it is a serious one.

It is now well established that on a contract for sale and purchase of land it is the practice to require the purchaser to pay interest on his purchase money from the date when he took possession : per Lord Cave L.C. in *Swift & Co.* v. *Board of Trade.* (1) The law on the point has also been extended to cases under the Lands Clauses Consolidation Act, 1845.

Their Lordships can see no good reason for distinguishing the present case from such cases. It is true that the expropriation under the Act in question is not effected for private gain, but for the good of the public at large, but for all that, the owner is deprived of his property in this case as much as

(1) [1925] A. C. 520, 532.

in the other, and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property without compensation unless the intention to do so is made quite clear. The statute in the present case contains nothing which indicates such an intention. The right to receive interest takes the place of the right to retain possession and is within the rule.

The respondents in their case state that they expropriated the land on October 13, 1920, the date from which the Appeal Division directed the interest to be calculated, and that date may be taken as correct.

Their Lordships are of opinion that the appeal and cross-appeal both fail and should be dismissed, but without costs in either case, and they will humbly advise His Majesty accordingly.

Solicitors for Inglewood Company : *Lawrence Jones & Co.*
Solicitors for Power Commission : *William A. Crump & Son.*

END OF VOL. AND OF APPELLATE SERIES FOR 1928.

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